

International and Operational Law Department
The Judge Advocate General's School
Charlottesville, Virginia

The Law of War and Operations Other Than War

LTC RICHARD B. JACKSON & MAJ GEOFFREY S. CORN

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I. INTRODUCTION.

A. Operations Other than War (OOTW).

1. Military OOTW encompass a wide range of activities where the military instrument of national power is used for purposes other than the large-scale combat operations usually associated with war. DOCTRINE FOR JOINT OPERATIONS, JOINT PUB 3.0 (Feb 1995) [hereinafter JP 3.0]. *See also*, DEPT OF ARMY, FIELD MANUAL 100-5, OPERATIONS (14 June 1993) [hereinafter FM 100-5]. While there are various types of OOTW (*see* FM 100-5), peace operations have spawned the majority of law of war related issues.

B. Law of War.

1. Traditional law of war regimes do not technically apply to OOTW. Examples include the following:
 - a. Operation JUST CAUSE (Panama): "Inasmuch as there was a regularly constituted government in Panama in the course of JUST CAUSE, and US forces were deployed in support of that government, the Geneva Conventions did not apply ... nor did the US at any time assume the role of an occupying power as that term is used in the Geneva Conventions." Memorandum from W. Hays Parks to the Judge Advocate General of the Army of 10/1/90.

- b. Operation RESTORE HOPE (Somalia): The 1949 Geneva Conventions do not apply because an international "armed conflict" does not exist." Operation Restore Hope After Action Report, Office of the Staff Judge, Unified Task Force Somalia (12 Apr 1993).
- c. Operation UPHOLD DEMOCRACY (Haiti): "The mandate of the MNF in Haiti was not military victory or occupation of hostile territory; rather it was "to establish and maintain a secure and stable environment" Moreover, the Carter-Jonassaint agreement - and the Aristide government's assent to that agreement - resulted in an entry that was based on consent and not hostilities between nations. Under these circumstances, the treaties and customary legal rules constituting the law of armed conflict do not strictly apply. LAW AND MILITARY OPERATIONS IN HAITI, 1994 - 1995: LESSONS LEARNED FOR JUDGE ADVOCATES, Center for Law and Military Operations 47 (11 December 1995) (quoting Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int'l L. 78-82 (1995)).
- d. Operation Joint Endeavor (Bosnia-Herzegovina). In preparation to deploy to Bosnia, the commanders of the 1st Armored Division spent a great deal of time preparing to meet the civilian challenge "posed by stability operations . . . those operations that exist outside the scope of armed conflict, but place soldiers in situations where they must simultaneously act to protect civilians and protect themselves from civilians." See Jim Tice, *The Busiest Major Command*, Army Times, Oct. 30, 1995, at 22-23.

2. Although not falling under the rubric of “international armed conflict,” OOTW consistently involve the potential, if not actual, employment of military force. This “disconnect” mandates that JA’s search for legal standards to guide the treatment of traditional victims of conflict, e.g. wounded, detainees, and civilians.
 - a. This search begins with DEP’T OF DEF. DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, (10 July 1979), which establishes the POLICY that “[t]he **Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized.**” (The United Nations employs a similar standard to guide the actions of personnel deployed on its operations, discussed *infra*).
 - b. Because in many cases US forces simply do not have the resources to fully comply with all the requirements of the law of war, this policy has been interpreted to require US forces “to apply the provisions of those treaties [the Geneva Conventions] to the extent practicable and feasible.” W. Hays Parks memorandum, *supra*.
3. Recent OOTW demonstrate that compliance with such a policy still results in “gaps” for the JA looking for standards of treatment for the various individuals encountered during such operations. What follows is a discussion of the legal standards, both international and domestic, applicable either expressly or by analogy to the treatment of civilians, detainees, and the sick and wounded during OOTW.

II. CIVILIAN PROTECTION.

- A. **WHO ARE THE CIVILIANS?** Many traditional Law of War conventions make reference to noncombatants and civilians, without providing a clear definition of either term.

1. The GC defines civilians as those persons who are not protected by one of the other three Geneva Conventions (which implies, but does not explicitly state, that they are not taking an active part in hostilities).
2. FM 27-10, chapter 5 states that "those persons protected by GC also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war."
3. GP I, article 50 defines a civilian as any person "who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.. IN CASE OF DOUBT WHETHER A PERSON IS A CIVILIAN, THAT PERSON SHALL BE CONSIDERED A CIVILIAN."
4. Practitioner Definition: Civilians are all persons who are not obviously (1) taking part in hostilities or (2) part of a belligerent force (to be part of the force, they must be integrated into that force). **If you have a doubt, resolve it in favor of bestowing civilian treatment.** Consider these two examples of persons that are not regular members of an armed force, but who pose a potential threat:
 - a. The contract technical advisor that spends each day working with members of an armed force to make a weapon system more effective (integrated with force, active role in hostilities - may be targeted and will be treated as PW upon capture).
 - b. The little girl that discovers an enemy special forces troop on her way home from school (not integrated - protected, treated as a civilian upon capture).

B. CIVILIAN PROTECTION LAW (CPL). CPL is an "analytical template" developed to describe the process for establishing protection for civilians across the operational spectrum. The CPL analytical process rests on four "tiers" of legal authority:

1. Fundamental Human Rights under International Law;
2. Host Nation Law;

3. Conventional Law (specific protections for specific individuals), and
4. Domestic Law and Policy (including extension “by analogy” of other sources of law not technically applicable).

C. **TIERS.** The four sources of law comprising CPL are described as four tiers of protections. The application of these tiers, either individually or in combination, is contingent upon the operational setting. The four tiers are:

1. TIER 1: Fundamental Human Rights.

a. **APPLICATION.** All civilians, regardless of their status, are entitled to first tier protections.¹ This first tier provides a foundation for JAs that represents the starting point for the legal analysis involved in the protection of civilians. Because this “core of rights” never changes, it also serves as an excellent default/start point for soldier training prior to deployment.

b. **COMPOSITION.** This tier is composed of those basic protections for individuals against any state policy or action which practices, encourages, or condones a violation of certain fundamental rights. These rights are found within numerous international declarations and treaties which reflect customary international law. These include:

(1) The right to a fair and regular trial;

(2) The right to be cared for when sick;

¹ In most cases, first tier protections are those rights and protections to which all persons, civilian or not, are entitled. For instance, the various declarations of fundamental human rights do not distinguish between combatants and noncombatants (noncombatants are generally defined as “persons left at liberty to pursue their normal activities....” RICHARD I. MILLER, *THE LAW OF WAR* (1975). Although this reference and most other references seem to limit the use of this term to civilians, many commentators expand the use of this term to include other categories of protected persons, such as prisoners of war, the sick and wounded, medics, and medical personnel. See DEPT OF NAVY, NWP 1-14M/MCWP 5-2.1/COMTPUB P5800.7, *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*, para. 11-1 (October 1995) [hereinafter NWP 1-14M].

- (3) The right to humane treatment;
- (4) Freedom from torture and cruel or degrading treatment;
- (5) Freedom from physical violence;
- (6) Freedom from arbitrary arrest and detention;
- (7) The right to be properly fed and cared for when detained or under the protection of a nation.

d. Relationship between Humanitarian Law and Human Rights Law. Military practitioners must recognize these two terms are not interchangeable (or entirely consistent).

- (1) Humanitarian Law refers to those conventions from the law of war that protect the victims of war (primarily the Geneva Conventions). Human Rights Law refers to a small core of basic individual rights embraced by the international community during the past forty years as reflected in various declarations, treaties, and other international provisions beginning with the UN Charter and Universal Declaration of Human Rights.
- (2) International humanitarian law regulates the conduct of state *visa vis* state, whereas human rights law regulates the conduct of state *visa vis* individual. The right to protection under humanitarian law is vested not in the individual, but in the state. Under human rights law, the protection flows to the individual directly, and theoretically protects individuals from their own state, which was a radical transition of international law.
 - (a) Traditional View: Displacement. At the outbreak of armed conflict, human rights law, generally considered a component of The Law of Peace, is displaced by Humanitarian Law, which is generally considered a component of the Law of War.

- (b) Emerging View: Dual Application. At the outbreak of armed conflict, human rights law remains applicable and supplements humanitarian law (human rights law is said to apply to human conduct regardless of where along the peace, conflict, war continuum such conduct is found, and regardless of what state commits the violation).
- d. SOURCES. The foregoing protections do not make up an inclusive list of all first tier protections. Practitioners should consult the numerous statements of this first and most basic level of protection, such as the Universal Declaration of Human Rights,² numerous human rights treaties, the Charter of the United Nations,³ and the third common article to the four Geneva Conventions of 1949.⁴ Although not every protection provided by these regimes is applicable to all civilians in the area of a potential U.S. operation, they provide a general understanding of the type of protections to which civilians are generally entitled.

² Although the Declaration was not intended to be binding on states as a part of positive international law, it has come to be accepted as "the universally accepted interpretation and definition of the human rights left undefined by the [UN] Charter." Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976), *reprinted in* JOHN N. MOORE, NATIONAL SECURITY LAW 696-697 (1990). Accordingly, nations that value their national prestige, generally follow the guidance provided by the Declaration. This is consistent with basic U.S. principles.

³ The preamble, and a large number of the articles 1, 13, 55, 56, 60, 62, 68, 76, 87 of the Charter contain a significant network of member state human rights obligations. Upon joining the United Nations, the United States' assumed the obligation to work toward the protection and preservation of "fundamental human rights, [and] the dignity and worth of the human person." The Charter mirrors the type of responsibility towards protecting human rights as do many subsequent human right treaties and declarations. U.N. CHARTER preamble, and arts. 1, 13, 55, 56, 60, 60, 62, 68, 76, 87•

⁴ Common article 3, by its own terms, is only applicable during (1) non-international (2) armed conflict. Many commentators, however, argue for a much more expansive application of the article, and if not the article, of the type of protections found within the article. OSCAR M. UHLER, COMMENTARY IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, 36 (Jean S. Pictet, ed. 1958). In fact, the International Court of Justice has held that the type of protections found within common article 3 "constitute a minimum yardstick" of treatment for all persons. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27)•

- (1) Common article 3. Originally intended to serve as the preface to the Geneva Conventions (it was to provide the purpose and direction statement for the four conventions), it was instead adopted as the law to regulate the controversial “non-international conflicts.”
 - (a) Common article 3 is technically a component of humanitarian law, not human rights law. However, the international community now considers the protections established by this provision so fundamental that they have essentially “crossed over” to status as human rights.
 - (i) ICJ Position: In 1986, the International Court of Justice ruled that article 3 serves as a “minimum yardstick of protection” in all conflicts, not just internal conflicts.⁵
 - (ii) More expanded common article 3. Many experts assert common article 3 is applicable to any type of operation, regardless of whether or not such an operation can be described as a conflict. **This mirrors U.S. practice in recent operations.**
 - (b) Common article 3 forbids:
 - (i) torture;
 - (ii) all violence to life or limb;
 - (iii) taking of hostages;
 - (iv) degrading/humiliating treatment;

⁵ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27).

(v) punishment without fair and regular trials;
and

(vi) failure to care for and protect the wounded
and sick.

(2) Universal Declaration of Human Rights.

(a) Not a treaty; it is only a “declaration.” A threshold issue regarding the Declaration is whether or not it represents customary international law. A number of commentators state that it does. This is critical, because only the principles reflecting customary international law are binding on the U.S.

(b) U.S. position and that of most commentators is that only the core articles within the Declaration have achieved status as customary international law. These articles include:

(i) the Common Article 3 “type” protections;
and

(ii) provisions that relate to prohibiting “any state policy to practice, encourage, or condone genocide; slavery; murder; torture; or cruel, inhuman or degrading treatment; prolonged arbitrary detention; [the denial of] equal treatment before the law.”⁶

⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 702.

- (iii) Whether Declaration provisions which guarantee the right to private property reflect customary international law is less clear. The U.S. does recognize the customary status of at least the Declaration's "core of rights to private property."⁷
- (c) Distinguish between saying we are applying common article 3 type protections and providing protections "consistent with" the Declaration.
 - (i) Less flexibility. The Declaration's core articles are reflections of customary law and must be observed. No caveat of "acting consistent with" will insulate U.S. from future obligations to comply with these provisions.
 - (ii) The Declaration's article 10 right to a fair and public hearing by an independent and impartial tribunal of any criminal charges and the article 11 right of presumed innocence are not considered customary international law by the U.S. However, the U.S. practice has been to afford these type of protections by acting "consistent with" these articles. In fact, in UPHOLD DEMOCRACY the U.S. sent a civil affairs team to Haiti to erect a fair judicial system. **This caveat preserves our policy that these provisions do not amount to customary international law, even though our actions are in compliance.**

⁷
Id. § 702 k.

- (d) Declaration provisions the U.S. does not consider reflective of customary international are technically not binding on the U.S. **However, these may nonetheless be integrated into the planning phase of operations and serve as guidance. The U.S. supports the spirit of the Declaration and acts consistent with all provisions unless doing so is wholly impractical.**
- (3) Human Rights Treaties.
 - (a) The “decade of ratification.” In the past decade Presidents Reagan, Bush and Clinton have ratified a number of important human rights treaties potentially impacting the conduct of U.S. forces during future military operations.
 - (i) These treaties include the International Covenant of Civil and Political Rights (ratified in 1992); the Convention on the Prevention and Punishment of the Crime of Genocide (ratified in 1988); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment (ratified in 1994).
 - (ii) International Bill of Rights. This is not a treaty *per se*, but is a package of rights derived from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The U.S. has not and probably will not ratify the Covenant on Economic, Social and Cultural Rights.

- (b) Extraterritoriality. Although the United States has ratified a number of important human rights treaties, it has reduced the importance of these treaties by stating that these regimes do not have extraterritorial application. (The opposite view is espoused by other nations and a number of well recognized international law authorities).
 - (i) Traditional presumption: human rights law is directed at regulating the way nations treat their own population. Under this view, human rights treaties do not apply extraterritorially unless the parties agree to such application.
 - (ii) Scope articles. Many treaties include articles specifically establishing the scope of application. For instance, article 2 of the International Covenant of Civil and Political Rights states that the treaty applies to “all individuals within [a party’s] territory and subject to its jurisdiction.” These provisions do not eliminate controversy. Notwithstanding such language, the U.S. asserts it owes an obligation to persons both within its territory and subject to its jurisdiction. Many experts believe, however, this language extends jurisdiction to persons who are either in a nations territory or subject to their jurisdiction. This interpretation might dramatically alter the U.S. treaty obligation during the course of overseas operations. (The U.S. took no reservation, and made no understanding or declaration in regard to this issue).

- (iii) Because the conduct of a nation may be regarded as evidence of how that nation interprets a treaty, the safest practice is to rely on common article 3 protections and the customary international law provisions of the Universal Declaration as our guideline for civilian protections. Actions that follow the dictates of other treaty or declaration provisions should be taken “consistent with,” and not “in accordance with” those provisions.
- (c) Non-Self-Executing (NSE) Treaties. The U.S. has made a written NSE declaration during the ratification process, which it has appended to each of these treaties (interestingly, the U.S. did not take a formal NSE reservation to any of the treaties). This theoretically removes these treaties from consideration during the course of both domestic and overseas operations. Although, the U.S. has not enacted legislation to execute obligations under these treaties, it does consider them during the planning and execution phases of overseas operations. Again, however, this is a policy based consideration and not a legally obligated consideration. **Remember, however, that a provision of a treaty that reflects customary international law is binding on U.S. operations regardless of whether the treaty is self-executing.**

2. TIER 2: Host Nation (HN) Law Providing Specific Rights to an Indigenous Population.
- a. APPLICATION. U.S. policy and international law require the observance of host nation law unless such law “constitutes a threat to ... security or an obstacle to the application of [international law].”⁸ Therefore, these laws must be observed **so long as they are not displaced as a result of the nature of the operation, or conflict with binding international law obligations** (in most cases such an obligation would come from Tier 1). The traditional rule is that host nation law applies unless:
- (1) waived by international agreement, SOFA, or SOMA (in which case there is conventional international law in the form of an agreement which displaces the host nation law);
 - (2) U.S. forces engage in combat with host nation forces (in which case international humanitarian law displaces host nation law); or
 - (3) U.S. forces enter under the auspices of a U.N. sanctioned security enforcement mission.
- b. COMPOSITION. Second tier protections include any protections afforded by host nation law that retain viability after the entry of U.S. forces. The most common forms of host nation protections involve rules that regulate deprivation of property and liberty.
- c. SOURCES. The host nation’s (1) constitution, (2) criminal code (both substantive and procedural rules), (3) environmental protection regime, and (4) civil codes that deal with use of property. In addition, any (5) SOFAs, SOMAs, or international agreements that impact the application of host nation law.

⁸ FM 27-10, *supra* note 9, at para. 369 and GC, *supra* note 3, at art. 64.

- d. THE CONFLICT (“PICARD”) SPECTRUM. Applicability of host nation law may be contingent on the nature of the operation. These operations exist along a spectrum. At one extreme is invasion, OOTW lay in the center, and tourism or uncoerced invitation lie at the other extreme.
- (1) INVADER. If a force enters as an invader, in the context of an article 2 “international armed conflict,” the force is immunized from host nation law. This concept is a Public International Law concept referred to as the **Law of the Flag. The invading force takes its own law with it, and disregards all other law.** (It is important to remember that the Law of the Flag includes international law that is binding on all nations. Because of this, an invading force that may be immunized from host nation law is still fully bound by international humanitarian law. Thus, host nation law protecting civilians is displaced by the law of the invading force, which always includes the civilian protections of the Geneva Convention).
- (2) UNCOERCED INVITATION. If a force enters by truly voluntary invitation, host nation law applies absolutely. The entering force may gain immunity from this law only to the extent that the host nation grants such immunity by international agreement. These forces may also gain limited immunities if conducting operations under the authority of the U.N.

- (a) In this situation, the host nation government is usually in full control of governmental apparatus. The entering force's obligation to host nation civilians can generally be characterized as a negative obligation - to allow the host nation to continue to execute its domestic responsibility to the population.
 - (i) This does not mean that there are no obligations regarding the treatment of host nation civilians. Our forces are bound to ensure that civilians we encounter are treated in accordance with the obligations imposed on us arising out of Tier 1.
 - (ii) This is a substantially different obligation than arises during a non-permissive entry, which can generally be characterized as positive - to do what is required under the Law of the Flag to care for and protect this population.
- (b) JAs should seek information on host nation law and applicable international agreements from the unified command.
 - (i) Attempt to identify those countries whose host nation law may be applicable to our operations during OPLAN review.
 - (ii) Attempt to gain information regarding host nation laws from sources such as Civil Affairs units and higher headquarters.
 - (iii) Work with Civil Affairs staff elements to develop soldier guides for host nation law.

- (3) OOTW (Coerced Invitation?). OOTW is found at the center of the CONFLICT SPECTRUM. U.S. forces enter the host nation as neither invaders or guests. Therefore, the **obligation** to follow host nation law is questionable. **The response: sensitivity to host nation law, but refusal to treat such law as absolutely binding on U.S. forces.** Operations UPHOLD DEMOCRACY and JOINT ENDEAVOR are examples of this type of status. (Adherence to Tier 1 obligations should help to ensure our forces retain the moral high ground even if they are not in full compliance with host nation law)

3. TIER 3: Conventional Law (The Hard Law).

- a. APPLICATION. The third tier of protection is determined by the circumstances that surround the operation and the particular status of the civilians that may be affected by the operation. The obligations under this tier derive from the status of the beneficiary, and not the nature of the operation.

Contrast the third tier protections bestowed upon a person who satisfies the definitional requirements necessary to be considered a “refugee,” with an individual who is only granted status as a “migrant” (a fourth tier status). The “refugee” is entitled to a protected status by operation of conventional law. In contrast, the “migrant’s” treatment is based upon temporary policy derived from analogy to and extension of the same body of law. In the second instance, the law is only used as guidance.

- b. COMPOSITION. This tier includes protections bestowed by treaties such as the Hague and Geneva Conventions. Such treaties provide **protections to specific groups of persons under specific circumstances.** The conventions of the third tier, when triggered, are viewed to absolutely bind the conduct of the United States.

In addition to the Law of War conventions referred to above, examples of third tier protections are diplomatic status, political asylum, temporary refuge, and the rights and protections granted by domestic and customary international law to those seeking refuge. In each case, a special package of protections becomes available for individuals when specific criteria are satisfied.

- c. SOURCES. The sources of law differ depending upon the type of operation and the status of the person. For example, the 1967 Refugee Protocol and the Refugee Act of 1980 provide protections for individuals granted that status. Third Tier law includes the various Law of War conventions. The most significant of these conventions are the Hague Regulations, the Geneva Convention Relative to the Protection of Civilian Persons, and Protocols I and II Additional to the Geneva and include the Hague Conventions.⁹

- (1) Although not ratified by the U.S., we acknowledge many provisions of **the Protocols** reflect customary international law.
- (2) Because we do not want our practice to contradict our refusal to ratify these protocols, we characterize our compliance with the principles represented therein as either compliance with customary international law, or application of law by analogy.

Not included within this group of conventions are the various human rights conventions ratified by the United States, for reasons discussed above (non-self-executing and non-extraterritorial).

⁹ These protections, however, apply only in a very narrow set of circumstances. First, hostilities that satisfy the GC, article 2 definition of armed conflict (common article 2) must be present. Second, the civilians must be situated under the even narrower circumstances required by each of the individual subparts of the foregoing treaties.

4. TIER 4: Domestic Law & Policy (Including Law by Analogy/Extension).

a. APPLICATION. The 4th tier of protections emerge when JAs blend law by analogy and extension, common sense, and mission imperatives. Recent operations demonstrate this process. During Operations PROVIDE COMFORT, RESTORE HOPE, and UPHOLD DEMOCRACY, JAs dealt with the paradox of operations not considered international armed conflict which nonetheless virtually satisfied the classical elements of formal occupation. Accordingly, many of the responsibilities, rights, protections, and obligations established by traditional occupation law were observed by analogy and extension.

- (1) This process of using analogy to other bodies of civilian protection law to develop a structure for dealing with civilian populations is essential to fill the void of authority that results from the lag time for international law to develop standards to apply to such situations.
- (2) The significance of applying such a process may extend beyond any given operation. Because international law emerges from the customary practice of nations, our conduct may in fact form a foundation for future international law standards.
- (3) There are several sources of authority for the process of “law by analogy.” Both DoD Dir. 5100.77 (The DoD’s Law of War Program Directive) and the Standing Rules of Engagement (SROE) require that the Law of War and similar domestic law and policy be applied in all military operations, even where not technically triggered, to the extent such application is feasible. Additionally, any other law that logically forms the basis of an analogy should be considered.

- b. COMPOSITION. JAs familiar with the nature and likely impact on civilians of any given operation must search for third tier conventions; domestic statutes, executive orders, and directives. The objective of this process is to ascertain sources of law that will enable the force to meet mission requirements while providing civilian protection rules sufficient to maintain the legal legitimacy of the operation. Then, using third tier law as guidance, JA's synthesize lessons learned, common sense, operational realities, and mission imperatives to develop fourth tier rules.
 - (1) These rules must then be translated into operational parameters and transmitted to the force.
 - (2) Relative to most OOTW, third tier protections become especially significant in this process. When policy makers and JAs begin the process of determining what rules will belong within a package of fourth tier protections, the third tier almost always provides a logical start point for conducting such an analysis.

E. CPL AND FORCE PROTECTION:

- 1. Reconciliation of force protection concerns and civilian protection concerns is a major issue during any military operation, regardless of where it falls on the conflict spectrum. JA's must be cognizant that these concerns are often regarded as "competing," and be prepared to dispel such conceptions through careful application of the CPL analytical process.
- 2. DEFENSE OF FORCE. The concept of protecting/respecting civilian non-combatants, when properly executed, should never be inconsistent with Rules of Engagement that are consistent with the law of war.
 - a. Immediate Harm. CPL application DOES NOT supplant the operation of any existing ROE. The protections due to the civilian population, although important, never take priority over the individual soldier's inherent right to self-defense.

- (1) ROE should never be inconsistent with CPL. CPL should be considered in the drafting of the ROE. For instance, if CPL application dictates a requirement to protect the civilian population, the ROE should be crafted to do so.¹⁰
- b. Less Immediate Harm. What about the threat posed by lack of information? How does CPL impact the force's ability to collect information from civilian sources. Application of the four tier approach answers this question. CPL prohibits treatment that might be construed as inhumane (tier 1: common article 3 and the Universal Declaration of Human Rights). This is enhanced by one underlying goal of international humanitarian law, which is to foster positive relations between our forces and the indigenous population (application of a third tier principle by analogy/extension).
- (1) The doctrinal methods employed by U.S. forces to gather information are not inhibited by this analysis. Military Intelligence collection technique doctrine is consistent with this position (limitation). For a variety of reasons, to include inherent counter-productivity, this doctrine never recommends coercive or abusive methods of interrogation (any such doctrine would be inconsistent with both tier 1 and tier 3 protections).¹¹

¹⁰ The initial ROE for Operation UPHOLD DEMOCRACY (6 September 1994) permitted the detainment of only of those who interfered with the mission, committed hostile acts, or demonstrated hostile intent. On 23 September 1994, CJTF 180 issued the second ROE of Operation UPHOLD DEMOCRACY. This ROE provided for the protection of civilians. In short, it permitted the detainment of "persons observed committing serious criminal acts," which included homicide, assault, rape, arson, and robbery.

¹¹ See DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION 1-15 thru 17 (28 Sep 1992) [hereinafter FM 34-52]. FM 34-52 expressly states that the humane treatment doctrine of the Law of War must be observed during interrogation. Additionally, the manual goes on to say that these same principles should be applied during other types of military operations.

- (2) In addition to the basic tier one protections described above, operational lawyers must also study tier two law (host nation law). Our forces must be cognizant of host nation rules regarding detainment and interrogation. Violation of such protections may not result in a “sanction” under the host nation law. However, the risk of undermining the legal legitimacy of the operation may be the operational sanction.
- (3) If the operation is part of an international armed conflict then the very clear mandates of the Geneva Conventions (Tier Three) must also be factored in. These limitations are entirely consistent with the Tier One protections described above (humane treatment, no sleep or food deprivation, no threats of bodily harm, no use of humiliation., etc.).

F. CPL AND CIVILIAN DETAINMENT IN OOTW: THE BOTTOM LINE. (See Appendix A for a more detailed discussion).

1. Plan for the construction, operation and procedures of a Civilian Detention Facility.
2. Realize that the ICRC and CNN will know about and visit your final product.
3. Look to the AAR of UPHOLD DEMOCRACY,¹² but realize that JAs in future operations can do a better job in planning and using the existing law by analogy to establish civilian detention facilities.

G. CPL AND CIVILIAN PROPERTY IN OOTW: THE BOTTOM LINE. (See Appendix B for a more detailed discussion).

1. Everyone enjoys the right to own property: never arbitrarily deprive civilians of property.

¹²

Also refer to the CLAMO REPORT: LAW AND MILITARY OPERATIONS IN HAITI, LESSONS LEARNED FOR JUDGE ADVOCATES (1995).

2. Follow the “nine commandments” of property use during armed conflict (found in chap. 7 of deskbook) as law by analogy/extension.
3. Destroy property only when absolutely necessary.
4. Protect and safeguard property of persons under the control of our forces.

H. CPL AND DISPLACED PERSON IN OOTW: THE BOTTOM LINE. (See Appendix C for a more detailed discussion)

1. Always use precision when classifying individuals as either **refugees** or **migrants**, and understand how this status impacts on the rights afforded by U.S. forces.
2. Refugee Act (executing the Refugee Convention) is not considered to have extraterritorial application.
3. Return/expulsion of refugees: US position - applies only after entry into U.S. territory; UN position - applies no matter where refugee located.
4. Military personnel **never** authorized to grant asylum; **temporary refuge** is the most US military should ever bestow.
5. Different procedures for asylum/refuge requests depending on where request made.

III. OBLIGATIONS TOWARD THE WOUNDED & SICK IN OOTW.

A. Medical activities as part of the OOTW mission.

1. Medical activities may be undertaken as a primary mission during OOTW. For example, health service support operations may be part of, if not the primary goal of, a larger humanitarian and civic assistance (HCA) program. In such cases, a primary mission is to seek out the sick and provide care to designated portions of the civilian population. JOINT PUB 4-02, DOCTRINE FOR HEALTH SERVICE SUPPORT IN JOINT OPERATIONS IV - 1 - IV - 2 (15 Nov. 1994). *See also* MG George A. Fisher memorandum regarding Medical-Civil Action Guidelines of 1/25/95 (attached).
2. Medical activities may also be focused primarily on supporting combat units. Law of war issues are most likely to arise under such circumstances. This raises the issue of what humanitarian standards are applicable.
 - a. The following discussion of such standards is drawn from the Geneva Wounded and Sick Convention (GWS) and experiences during Operation Restore Democracy.
 - b. Two excellent sources of lessons learned in this area are Memorandum from MG George A. Fisher, MNF Medical Rules of Engagement (ROE) Policy of 1/25/95, and Asbjorn Eide, Allan Rosas, Theodor Meron *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards* 89 A.J.I.L. 215 (1995) (discussing certain minimum humanitarian standards applicable to all situations).

B. Humanitarian Standards.

1. Respect and protect the wounded and sick (Article 12 GWS). The obligation not to attack the wounded and sick and to provide basic care. The type of basic care provided is discussed *infra* in terms of emergency care. The categories of wounded and sick persons is generally considered to include civilians.
2. Search for and collect wounded and sick and the dead (Article 15, GWS). This standard does not translate well to OOTW. At best it can be applied to the extent practicable and feasible. W. Hays Parks memorandum, *supra*.
 - a. Note that even under the GWS, this requirement is subject to military practicability, i.e. the obligation is not absolute.
 - b. Furthermore, the obligation to search for civilian wounded under Article 16 Geneva Civilians Convention ("as far as military consideration allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded [civilians]) is not as strong as the obligation to search for those protected under the GWS (primarily members of the armed forces). This language recognizes the primacy of civilian authorities in the matter of caring for civilians. See DEP'T OF ARMY FIELD MANUAL 8-10, HEALTH SERVICE SUPPORT IN A THEATER OF OPERATIONS, para. 3-17 (1 Mar 1991).
 - c. Finally, consistent with the primacy of civilian authorities mentioned above, there are also sovereignty issues at play in situations such as those encountered in Panama and Haiti. "Primary responsibility for the collection, burial, and accountability for the wounded and dead lay with the Government of Panama. U.S. assumption of any responsibility for the burial of deceased Panamanians, military or civilian, would have constituted a breach of Panama's sovereignty without its express consent." W. Hays Parks memorandum, *supra*.

- d. Consequently, the US policy in Haiti was to render emergency care required to save life, limb, or eyesight to Haitian civilians. Thus, on site medical personnel were permitted to provide emergency stabilization, treatment, and to arrange transportation to civilian hospitals. Additionally, in Haiti, treatment was provided to those persons injured as a result of US actions. *See* MG Fisher memorandum, *supra*.
- 3. Medical, religious and other humanitarian personnel shall be respected and protected. US forces should have no difficulty complying with this standard.

IV. PEACE OPERATIONS AND THE LAW OF WAR

A. Applicability of the Law of War to Peace Operations.

- 1. The UN has never recognized its ability to actually become a party to the Geneva Conventions.
 - a. Legal questions continue as to whether the UN is considered a "Power" capable of acceding to the Conventions and if it is capable of carrying out the provisions of the Geneva Conventions, particularly the Civilians Convention.
 - b. However, at least in the case of traditional peacekeeping operations (Chapter VI), the UN does consider such forces to be subsidiary organs of the UN and subject to its authority. Thus, the fact that the individual nations may have declared their intent to comply with the conventions may not be sufficient. Dietrich Schindler, *UNITED NATIONS FORCES AND INTERNATIONAL HUMANITARIAN LAW, STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES* 524 (C. Swinarski, ed. 1984); Umesh Palwankar, *Applicability of International Humanitarian Law to United Nations Peacekeeping Forces*, *International Review of the Red Cross* 232 (May-June 1993).

2. During the Korean War UN organizations made no statements regarding the applicability of the Geneva Conventions, although the UN commander stated that he directed his forces to abide by the humanitarian principles of the conventions and the detailed provisions of the PW convention. The United States and other states providing contingents, however, stated they would be guided by the **principles** of the 1949 Conventions (the US did not actually ratify the Conventions until 1955). Schindler, *supra*, at 521.
3. What has become clear, however, is that once UN forces are engaged in **hostilities**, the Geneva Conventions do become applicable by virtue of the fact that the vast majority of their provisions are considered customary international law. Thus, the conventions become binding on the UN even without any formal accession or declaration. It would be illogical not to apply rules applicable to states to what is a universal organization of states. Schindler, *supra*, at 526.
 - a. The difficulty is determining when UN forces are engaged in hostilities, i.e. international armed conflict (common article 2, Geneva Conventions). The only clear cases of this are Korea and Desert Storm.
4. During other peace operations, e.g. peacekeeping operations, the UN position is that its forces will comply with the "**principles and spirit**" of International Humanitarian Law (Law of War). Palwankar, *supra*, at 232.
 - a. The Status of Forces Agreement between the UN and Haiti for the UN Mission in Haiti is an example of this policy: "The UN will ensure that UNMIH carries out its mission in Haiti in such a manner as to respect fully the principles and spirit of the general international conventions on the conduct of military personnel. These international conventions include the four Geneva Conventions, the Additional Protocols, and the 1954 Hague Cultural Property Convention."
 - b. The Government of Haiti took on a corresponding obligation.

- B. Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 34 I.L.M. 842.
1. Signed by 43 countries, including the U.S., as of May 1997.
 2. A response to the rising casualty figures among UN personnel deployed in support of peace operations (130 killed in 1993). Evan Bloom, *Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, 89 A.J.I.L. 621 (1995).
 3. UN and associated personnel and UN operations are broadly defined so as to include associated military contingents, NGOs, contractors, and others. Forces such as the NATO force in Bosnia and UNMIH qualify for protection. Statement of US Ambassador Karl F. Inderfurth to the UN General Assembly of 12/9/94.
 4. Scope of Application: All cases involving UN and associated personnel and UN operations outside of those Chapter VII enforcement actions in which **any** UN forces are engaged as **combatants** against organized armed forces and to which the international law of armed conflict applies.
 - a. Refer to UN Security Council Resolution to determine if the operation is a Chapter VII operation.
 - b. Determining whether the operation is an enforcement action requires a review of the object and purposes of the resolution, e.g. is the use of force authorized? Is the action undertaken regardless of the Parties to conflict's consent? Bloom, *supra*, at 94.
 - c. Finally, are UN personnel engaged as combatants? As discussed above, this is a difficult determination to make. The UN and US position was that UN forces in Somalia and in Bosnia did **not** become combatants. No clear guidance as to when UN forces become combatants currently exists. Operation Desert Storm and traditional peacekeeping missions provide clear examples of non-applicability of the convention (i.e., LOW applies) and applicability (UN Convention applies), respectively.

5. Main goal of the Convention is to provide for universal criminal jurisdiction for those committing serious offenses against these personnel.
 - a. Prosecute or extradite standard. Designed to put pressure on governments to take more responsible action in protecting UN personnel. Denies "safe Haven" to the attackers. Mahnoush H. Arsanjani, Protection of United Nations Personnel (draft), speech to Duke University Conference on Strengthening Enforcement of Humanitarian Law, 3/10/95.
 - b. Consequently, this convention and the grave breach provisions of the Geneva conventions provide seamless protection to the participants. Inderfurth statement, *supra*.
 6. Crimes enumerated in the convention include murder, kidnapping, or other attacks on the person or premises of UN and associated personnel.
 7. If captured, these personnel are not to be interrogated and are to be promptly released. Pending their return, they are to be treated consistently with principles and spirit of the Geneva Convention.
 8. UN and associated personnel always retain their right of self-defense.
- C. Current Status: 43 Signatories; 11 Parties (22 required for the treaty to enter into force).

APPENDIX A

CPL AND CIVILIAN DETAINMENT

I. DEPRIVATION OF LIBERTY.

A. Four types of deprivation (see generally Rights of Protected persons, this outline pp. 24-27):

1. Detainment;
2. Internment;
3. Assigned residence;
4. Simple imprisonment (referred to as confinement in AR 190-57)¹³:
 - a. includes pre/post-trial incarceration.
 - b. pretrial confinement must be deducted from any post-trial period of confinement.
 - c. a sentence of to imprisonment may be converted to a period of internment.

G.C. Arts. 68-71.

¹³ The distinction between confinement and internment is that those confined are generally limited to a jail cell ("CI camp stockade"), while internees remain free to roam within the confines of a internee camp. AR 190-57, para. 2-12.

B. DETAINMENT IN OOTW.

1. Detainment defined: Not formally defined in International Law. Although it may take on characteristics of confinement, it is more analogous to internment (which is formally defined and explained in the LOW). Within Operation JOINT ENDEAVOR detention was defined as “a person involuntarily taken into custody for murder, rape, aggravated assault, or any act or omission as specified by the IFOR Commander which could reasonably be expected to cause serious bodily harm to (1) civilians, (2) non-belligerents, or (3) IFOR personnel.”¹⁴
2. Detainment is Typically Authorized (by a designated task force commander) For:
 - a. Serious crimes (as described above);
 - b. Posing a threat to U.S. forces (or based upon CINC authority, the coalition force);
 - c. Violating rules set out by the intervention forces. For example, the IFOR in Operation JOINT ENDEAVOR authorized detainment for persons who attempted to enter controlled areas or attack IFOR property.¹⁵
 - d. Obstructing the forces’ progress (obstructing mission accomplishment in any number of ways to include rioting, demonstrating, or encouraging others to do so).
3. While these categories have proved effective in past operations, JA’s must ensure that the categories actually selected for any given operation are derived from a mission analysis, and not simply from lessons learned.

¹⁴ See TASK FORCE EAGLE: JOINT MILITARY COMMISSION POLICY AND PLANNING GUIDANCE HANDBOOK (21 Mar.

1996).

¹⁵ *Id.*

4. The LOW (and therefore, the Geneva Conventions) does (do) not technically apply to OOTW. However, pursuant to the fourth tier methodology, the LOW should be used as guidance during OOTW.

5. In OOTW, JAs should:

- a. Advise their units to exhaust all appropriate non-forcible means before detaining persons who obstruct friendly forces.
- b. Look to the mission statement to determine what categories of civilians will be detained. The USCINCENT Operation Order for Unified Task Force Somalia (1992) set out detailed rules for processing civilian detainees. It stated that:

In the area under his control, a commander must protect the population not only from attack by military units, but also from crimes, riots, and other forms of civil disobedience. To this end, commanders will: . . . Detain those accused of criminal acts or other violations of public safety and security.

- c. After determining the type of detainees that will find their way into U.S. hands, they should apply the four tiered process of CPL to determine what protections should be afforded to each detainee.

- (1) Tier 1: Detainment SOPs might provide that all detainees will be afforded rights “consistent with” with the Universal Declaration of Human Rights and Common article 3.

** The term “consistent with” is a term of art insulating the U.S. from assertions of formal recognition that we are bound to certain obligations. The U.S. does not say anyone is entitled to anything. This ties in with the confusion relative to which protections under the Universal Declaration are customary law and which are not.

- (2) These protections are translated into rules such as those listed below, which were implemented by the IFOR during Operation JOINT ENDEAVOR:
 - (a) Take only items from detainees that pose an immediate threat to members of the force or other detainees.
 - (b) Use minimal force to detain or prevent escape (this may include deadly force if ROE permits).
 - (c) Searches must be conducted in such a way as to avoid humiliation and harassment.
 - (d) Detainees shall be treated humanely.
 - (e) Detainees shall not be physically abused.
 - (f) Contact with detainees may not be of a sexual nature.
- (3) Detainees may not be used for manual labor or subservient tasks.
- (4) Tier 2: Apply procedural protections afforded by the host nation to individuals detained under similar conditions. For example, if the host nation permits the right to a magistrate review within so many hours, attempt to replicate this right if feasible.
- (5) Tier 4: JOINT ENDEAVOR SOPs provide detainees with the right to EPW treatment (EPW status is not bestowed, although a few SOPs incorrectly state that it is).

Categorization and Segregation. The SOPs then go on to provide that the detainees will be categorized as either criminal or hostile (force protection threats). Those accused of crimes must be separated from those detained because they pose a threat to the force. In addition, detainees must be further separated based upon clan membership, religious beliefs, or any other factor that might pose a legitimate threat to their safety.

- d. In both Somalia and Haiti, the U.S. ran extremely successful Joint Detention Facilities (JDFs). The success of these operations was based upon a simple formula.
 - (1) Detain people based upon a clear and principled criteria.
 - (2) Draft an JDF SOP with clear rules that each detainee must follow and rights to which each detainee is entitled.
 - (3) Base the quantity and quality of the rights upon a principled approach: CPL.
- 6. When in the fourth tier (law by analogy) look to the GC, in addition to the GPW when dealing with civilians. The practice of JTF JAs in Operations RESTORE HOPE and RESTORE DEMOCRACY was to look only to the GPW. This caused a number of problems “because the GPW just did not provide an exact fit.”

SNAPSHOT OF OOTW DETAINMENT RULES (ANALOGIZED FROM THE
GC AND OTHER APPLICABLE DOMESTIC AND INTERNATIONAL
LAW).

- (1) EVERY CIVILIAN HAS THE RIGHT TO LIBERTY AND SECURITY. NO ONE SHALL BE SUBJECTED TO ARBITRARY ARREST OR DETENTION. INT’L COV. ON CIVIL & POL. RTS. ART. 9. (UNIV. DECLAR. OF HUMAN RIGHTS ART. 9). THIS IS CONSISTENT WITH THE GC REQUIREMENT THAT DETENTION BE RESERVED AS THE COMMANDER’S LAST OPTION. GC ART. 42.**
- (2) TREATMENT WILL BE BASED UPON INTERNATIONAL LAW, WITHOUT DISTINCTION BASED UPON “RACE, COLOUR, SEX, LANGUAGE, POLITICAL OR OTHER OPINION, NATIONAL OR SOCIAL ORIGIN, PROPERTY, BIRTH, OR OTHER STATUS.” UNIV. DECLAR. OF HUMAN RIGHTS ART. 2.**
- (3) NO DETAINEE SHALL BE SUBJECTED TO CRUEL, INHUMAN, OR DEGRADING TREATMENT. UNIV. DECLAR. OF HUMAN RIGHTS ART. 5.**
- (4) DETAIN AWAY FROM DANGEROUS AREAS. GC ARTS. 49 AND 83.**
- (5) THE PLACE OF DETAINMENT MUST POSSESS (TO THE GREATEST EXTENT POSSIBLE) EVERY POSSIBLE SAFEGUARD RELATIVE TO HYGIENE AND HEALTH. GC ART. 85.**

- (6) **DETAINEES MUST RECEIVE FOOD (ACCOUNT SHALL BE TAKEN OF THEIR CUSTOMARY DIET) AND CLOTHING IN SUFFICIENT QUANTITY AND QUALITY TO KEEP THEM IN A GOOD STATE OF HEALTH. GC ART. 89.**
- (7) **DETAINEES MUST BE MAINTAINED AWAY FROM PWS AND CRIMINALS. GC ART. 84. IN FACT, U.S. COMMANDERS SHOULD ESTABLISH THREE CATEGORIES OF DETAINEES:**
- (A) **THOSE DETAINED BECAUSE OF SUSPECTED CRIMINAL ACTIVITY;**
- (B) **THOSE DETAINED BECASUE THEY HAVE BEEN CONVICTED OF CRIMINAL ACTS; AND**
- (C) **THOSE DETAINED BECASUE THEY POSE A SERIOUS THREAT TO THE SECURITY OF THE FORCE.**
- (8) **DETAINEES SHALL BE DETAINED IN ACCORDANCE WITH A STANDARD PROCEDURE, WHICH THE DETAINEE SHALL HAVE ACCESS TO. GC ART. 78. DETAINEES HAVE THE RIGHT TO APPEAL THEIR DETENTION. THE APPEAL MUST BE PROCESS WITHOUT DELAY. GC ART. 78.**
- (9) **ADVERSE DECISIONS ON APPEALS MUST (IF POSSIBLE) BE REVIEWED EVERY SIX MONTHS. GC ART. 78.**
- (10) **DETAINEES RETAIN ALL THE CIVIL RIGHTS (HN DUE PROCESS RIGHTS), UNLESS INCOMPATIBLE WITH THE SECURITY OF THE DETAINING POWER. GC ART. 80.**

- (11) DETAINEES HAVE A RIGHT TO FREE MEDICAL ATTENTION. GC ARTS. 81, 91, & 92.**
- (12) THE DETAINING POWER MUST PROVIDE FOR THE SUPPORT OF THOSE DEPENDENT ON THE DETAINEE. GC ART. 81.**
- (13) FAMILIES SHOULD BE LODGED TOGETHER DURING PERIODS OF DETAINMENT. DETAINEES HAVE THE RIGHT TO REQUEST THAT THEIR CHILDREN BE BROUGHT TO THE PLACE OF DETAINMENT AND MAINTAINED WITH THEM. GC ART. 82.**
- (14) FORWARDING CORRESPONDENCE.**

(A) IN ABSENCE OF OPERATIONAL LIMITATIONS, THERE ARE NO RESTRICTION ON THE NUMBER OR LENGTH OF LETTERS SENT OR RECEIVED. IN NO CIRCUMSTANCE, WILL THE NUMBER SENT FALL BELOW TWO CARDS AND FOUR LETTERS. AR 190-57, PARA. 2-8.

(B) NO RESTRICTION ON WHOM THE DETAINEE MAY CORRESPOND. AR 190, PARA. 2-8.

(C) NO RESTRICTION ON THE NUMBER OR TYPE OF CORRESPONDENCE TO EITHER MILITARY AUTHORITIES OR PROTECTING POWER (ICRC).

NOTE: The foregoing rules applicable to internment, found in Section IV of Geneva IV and AR 190-57, are but an abbreviated list of the complete list of rules that apply.

APPENDIX B

CPL AND THE TREATMENT OF PROPERTY

I. TREATMENT OF PROPERTY.

- A. Tier 1. Every person has the right to own property, and no one may be arbitrarily deprived of such property. (Univ. Declar. of Human Rights Art. 17).
- B. Tier 2. The property laws of the host nation will control to the extent appropriate under Public International Law (The Picard Spectrum).
 - 1. Consider the entire range of host nation law, from its constitution to its property codes. For example in Operation UPHOLD DEMOCRACY the JTF discovered that the Haitian Constitution afforded Haitians the right to bear arms. This right impacted the methodology of the JTF Weapons Confiscation Program.
- C. Tier 3. If a non-international armed conflict is underway, only common article 3 applies, which provides no protection for property. If an international armed conflict is underway, the property protections found with the fourth Geneva Convention apply. The protections found within this convention are described in chapter seven as the nine commandments of property protection.
 - 1. During an international armed conflict, any destruction not “absolutely necessary” for the conduct of military operations is a war crime (GC art. 53). Further, if that destruction, devastation, or taking of property is “extensive” or comprehensive, the crime is considered a grave breach of the law of war (GC, art. 147). Accordingly, the “prosecute or extradite” mandate would apply to the individual/individuals responsible for such misconduct (GC, art. 146).

- a. What does “extensive damage” mean? In the official commentary to the convention, Pictet states that “extensive” means more than a “single incident.” However, Pictet does not discuss the possibility of a single attack that is of great scope (destruction of an entire city grid or more).
- b. Is this definition limited only to property in the hands of the enemy? Pictet also notes that article 147 modifies and supplements only article 53. This is important because article 53 only applies to property within occupied territory. Accordingly, if a warring nation were to bomb a civilian factory, and this bombing was not of absolute military necessity, one might conclude it is not a grave breach, and maybe not a breach at all (although it might violate article 23 of the Hague Regulations).

D. Tier 4 (Law by Analogy).

1. Follow the nine commandments of property use during armed conflict (found in chap. 7 of deskbook).
2. The occupying power cannot destroy “real or personal property . . . , except where such destruction is rendered absolutely necessary”. G.C. Art. 53.
3. **Pillage**. Defined as the “the act of taking property or money by violence.” Also referred to as plundering, ravaging, or looting.”
 - a. Forbidden in all circumstances (one of the general provision protections of Section I).
 - b. Punishable as a war crime or as a violation the UCMJ.
 - c. The property of a protected person may not be the object of a reprisal. (G.C. Art. 33).
 - d. **Control of Property**. The property within an occupied territory may be controlled by the occupying power to the extent:

- (1) Necessary to prevent its use by hostile forces.

OR

- (2) To prevent any use which is harmful to the occupying power.

NOTE: As soon as the threat subsides, private property must be returned. FM 27-10, Para. 399.

- e. Understand the relationship between the battlefield acquisition rules of Tier Three's conventional law property protections and the U.S. Military's Claims System. See Operational Law Handbook, chapter 10 and chapter seven of this deskbook.
- f. Protection of Civilian Property Under the Third Convention. For persons under the control of our forces (detained persons, etc.), the United States has frequently provided protection of property provided to EPWs under the Third Geneva Convention. For instance, all effects and articles of personal use, except arms and military equipment shall be retained by an EPW (GPW, art. 18). This same type of protection has a natural extension to civilians that fall under military control.

APPENDIX C

CPL AND DISPLACED PERSONS

I. TREATMENT OF DISPLACED PERSONS (REFUGEES).

- A. Generally, nations must provide refugees with same treatment provided to aliens and in many instances to a nation's own nationals. The most basic of these protections is the right to be shielded from danger.

1. REFUGEE DEFINED. Any Person:

- a. who has a well-founded fear of being persecuted for reasons of race, religion, nationality, social group, religion, or political association;
- b. who is outside the nation of his nationality; and
- c. is without the protection of his own nation, either because:
 - (1) that nation is unable to provide protection, or
 - (2) the person is unable to seek the protection, due to the well-founded fear described above.

** Harsh conditions, general strife, or adverse economic conditions are not considered "persecution." Individuals fleeing such conditions do not fall within the category of refugee.

** The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status is an excellent source of information on this subject. However, practitioners must recognize that the standards established by the UNHCR do not always correspond with U.S. policy.

2. **MIGRANT DEFINED:** Those who do not necessarily qualify for refugee status and the accompanying rights. The 1967 Protocol is not self-executing and therefore does not bestow any rights upon a person claiming refugee/refuge/political asylum status. Nation states are free to apply the definitional elements found with the Protocol.

B. MAIN SOURCES OF LAW:

1. 1951 Convention Relating to the Status of Refugees (RC). The RC bestows refugee status/protection on pre-1951 refugees.
2. 1967 Protocol Relating to the Status of Refugees (RP). The RP bestows refugee status/protections on post-1951 refugees.
 - a. Adopts same language as 1951 Convention.
 - b. U.S. is a party (110 ratifying nations).
3. 1980 Refugee Act (8 USC §1101). Because the RP was not self-executing, this legislation was intended to conform U.S. law to the 1967 RP.
 - a. Applies only to refugees located inside the U.S.¹⁶

¹⁶

Although the phrase "within the U.S." was removed in 1980, the courts have steadfastly interpreted this only to apply to the difference in the status of aliens already within the U.S. "Within the U.S." is a term of art used to apply to persons who have legally entered the U.S. A person who is physically within the U.S., having entered illegally, is not "within the U.S."

- b. This interpretation was challenged by advocates for Haitian refugees interdicted on the high seas pursuant to Executive Order. They asserted that the international principle of “non-refoulment” (non-return) applied to refugees once they crossed an international border, and not only after they entered the territory of the U.S.
 - c. The U.S. Supreme Court ratified the government interpretation of “non-refoulment” in *United States v. Sale*. This case held that the RP does not prohibit the practice of rejection of refugees at our borders. **(This holding is inconsistent with the position of the UNHCR, which considers the RP to prohibit “refoulment” once a refugee crosses any international border).**
- 4. Immigration and Nationality Act (8 USC §1253).
 - a. Prohibits Attorney General from deporting or returning aliens to countries that would pose a threat to them based upon race, religion, nationality, membership in a particular social group, or because of a particular political opinion held.
 - b. Does not limit U.S. authority outside of the U.S. (Foley Doctrine on Extraterritoriality of U.S. law).
- 5. Migration and Refugee Assistance Act of 1962 (22 USC §2601).
 - a. Qualifies refugees for U.S. assistance.
 - b. Application conditioned upon positive contribution to the foreign policy interests of U.S.

C. RETURN/EXPULSION RULE.

- 1. No Return Rule (RP art. 33). Parties may not return a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, social group, or political opinion.

2. No Expulsion Rule (RP arts. 32 & 33). Parties may not expel a refugee in absence of proper grounds and without due process of law.
3. According to the Supreme Court, these prohibitions are triggered only after an individual crosses a U.S. border. This is the critical distinction between the U.S. and UNHCR interpretation of the RP which creates the imperative that refugees be intercepted on the high seas and detained outside the U.S.
4. Grounds for Return or Expulsion.
 - a. Expulsion: (1) national security, (2) public order, or (3) danger to the community.
 - b. Return: (1) national security or (2) danger to the community.
5. Burden of Proof.
 - a. National security or public order = reasonable grounds.
 - b. Danger to community = conviction of serious crime.
 - c. Public Health Risks (e.g. HIV Positives):
 - (1) excludable as a threat to national security.
 - (2) Attorney General may waive medical exclusion for “humanitarian reasons.”
6. Other Traditional Exclusion Grounds:
 - a. prostitution
 - b. membership in communist or other totalitarian political group.

c. aliens who have made previous illegal entries.

D. FREEDOMS AND RIGHTS. Generally, these rights bestow (1) better treatment than aliens receive, and (2) attach upon the entry of the refugee into the territory of the party.

1. Freedom of Religion (equal to nationals).
2. Freedom to Acquire, Own, and Convey Property (equal to aliens).
3. Freedom of Association (equal to nationals).
4. Freedom of Movement (equal to aliens).
5. Access to Courts (equal to nationals).
6. Right to Employment (equal to nationals with limitations).
7. Right to Housing (equal to aliens).
8. Public Education (equal to nationals for elementary education).
9. Right to Social Security Benefits (equal to nationals).
10. Right to Expedited Naturalization.

E. DETAINMENT (See OOTW DETAINMENT above).

1. U.S. policy relative to Cuban Refugees (MIGRANTS) is to divert and detain.
2. General Principles of International Law forbid “prolonged & arbitrary” detention.

3. Detention that preserves national security is not arbitrary.
 4. No statutory limit to the length of time for detention (4 years held not an abuse of discretion).
 5. Basic Human Rights apply to detained or “rescued” refugees.
- F. **POLITICAL ASYLUM.** Protection and sanctuary granted by a nation within its borders or on the seas, because of persecution or fear of persecution as a result of race, religion, nationality, social group, or political opinion.
- G. **TEMPORARY REFUGE.** Protection given for humanitarian reasons to a national of any country under conditions of urgency in order to secure life or safety of the requester against imminent danger. **NEITHER POLITICAL ASYLUM NOR TEMPORARY REFUGE IS A CUSTOMARY LAW RIGHT.** A number of plaintiffs have attempted to assert the right to enjoy international temporary refuge has become a peremptory right under the doctrine of jus cogens. The federal courts have routinely disagreed. Consistent with this view, Congress intentionally left this type of relief out of the 1980 Refugee Act.
1. **U.S. POLICY.**
 - a. **Political Asylum.**
 - (1) The U.S. shall give foreign nationals full opportunity to have their requests considered on their merits.
 - (2) Those seeking asylum shall not be surrendered to a foreign jurisdiction except as directed by the SECARM.
 - (3) These rules apply whether the requester is a national of the country wherein the request was made or from a third nation.
 - (4) The request must be coordinated with the host nation, through the appropriate American Embassy or Consulate.

**This means that U.S. military personnel are never authorized to grant asylum.

- b. Temporary Refuge. The U.S., in appropriate cases, shall grant refuge in foreign countries or on the high seas of any country.

**This is the most the U.S. military should ever bestow.

H. IMPACT OF LOCATION WHERE CANDIDATE IS LOCATED.

1. IN TERRITORIES UNDER EXCLUSIVE U.S. CONTROL & ON HIGH SEAS:

- a. Applicants will be received in DA facilities or on aboard DA vessels.
- b. Applicants will be afforded every reasonable protection.
- c. Refuge will end only if directed by higher authority, “through the SECARMY.”
- d. Military personnel may not grant asylum.
- e. Arrangements should be made to transfer the applicant to the DOJ INS ASAP. Transfers don’t require DA approval (local approval).
- f. All requests must be forwarded in accordance with AR 550-1, para 7.
- g. Inquiries from foreign authorities will be met by the senior Army official present with the response that the case has been referred to higher authorities.

- h. No information relative to an asylum issue will be released to public, without HQDA approval.
 - (1) Immediately report all requests for political asylum/temp. refuge” to the Army Operations Center (AOC) at Commercial (703) 697-0218 or DSN 227-0218.
 - (2) The report will contain the information contained in AR 550-1.
 - (3) The report will not be delayed while gathering additional information
 - (4) Contact International and Operational Law Division, Army OTJAG (or service equivalent). The AOC immediately turns around and contacts the service TJAG for legal advice.

2. IN FOREIGN TERRITORIES:

- a. All requests for either political asylum or temporary refuge will be treated as requests for temporary refuge.
- b. The senior Army officer may grant refuge if he feels the elements are met: If individual is being pursued or is in imminent danger of death or serious bodily injury.
- c. If possible, applicants will be directed to apply in person at U.S. Embassy.

NOTE: During the application process and refuge period the refugee will be protected. Refuge will end only when directed by higher authority.

International and Operational Law Department
The Judge Advocate General's School
Charlottesville, Virginia

PROTECTION OF CIVILIANS DURING ARMED CONFLICT

MAJ CORN

REFERENCES

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I. INTRODUCTION.

CIVILIAN PROTECTION LAW DEFINED (CPL). CPL is a concept developed by the International and Operational Law Department, TJAGSA, to describe the laws *and policy* that establish protection for civilians across the operational spectrum.

CPL COMPONENTS. CPL consists of four primary sources of law:

Fundamental Human Rights under International Law;

Host Nation Law;

Conventional Law (specific protections for specific individuals), and

Domestic Law and Policy (including extension “by analogy” of other sources of law not technically applicable). ."

HISTORICAL BACKGROUND. Although the term was recently developed the concept is ancient. CPL's origin was based upon three motivations.

DESIRE OF SOVEREIGNS TO PROTECT THEIR CITIZENS. Based on reciprocal self-interests, ancient powers entered into agreements or followed codes of chivalry because they sought to establish rules that would protect their own land and people if fell under their enemy's control.

BASED UPON USE AS A COMBAT MULTIPLIER. Leaders such as Sun Tzu and Alexander recognized that enemy civilians who believed that they would be well treated were more likely to surrender and or cooperate with occupying forces. Therefore, sparing the vanquished from atrocities made future operations easier.

RELIGIOUS AND PHILOSOPHICAL DESIRE TO PROTECT ALL MANKIND FROM THE DEVASTATION AND SUFFERING CAUSED BY WAR. A number of religious leaders and scholars began to write about "the natural law" as a source of freedom from certain outrages of war. Rules motivated by this philosophy generally provided protection for all categories of persons, to include fallen warriors, and to a limited extent, civilians.

ANCIENT EXAMPLES. Throughout history, military leaders and legal scholars from numerous cultures recognized the utility of sparing civilians from the horrors of war, and adopted rules to achieve this goal. However, these rules were limited in scope:

Ancient leaders recognized that unrestrained warfare jeopardized reconciliation and made subsequent peace and trade more difficult to maintain.

WHEN COMPARED TO OTHER CONCEPTS WITHIN THE LAW OF WAR, ANCIENT RULES RELATIVE TO CIVILIANS WERE RARE. Most of the ancient rules of warfare were geared to limit methods of waging war between soldiers. This is because most battles, with the exception of siege warfare, were fought on battlefields far away from population centers.

ANCIENT CODES WERE BASED UPON MILITARY UTILITY, NOT HUMANITARIAN MOTIVES.

Civilian populations were spared so that they could be put to work, pay tributes, or be conscripted into the victorious army. Mercy was also motivated by a desire to avoid future brutality directed towards civilians of the conquering nation.

ANCIENT CPL WAS LIMITED BY THE PARALLEL DEVELOPMENT OF JUST WAR CONCEPT (335 B.C. TO 1800). In a nutshell, the Just War Period saw the development of practice and rules that limited recourse to war to "just causes." If the use was just, then war was legal. If war was deemed legal, the rules that regulated the conflict were sparse.¹⁷

¹⁷ Some writers break this concept into the Jus Ad Bellum (justness of war) and Jus In Bello (justness in war). Referring to the differing sets of rules that regulate when it is legally permissible to engage in armed conflict, and once engaged in conflict, what practices are legal within a conflict.

II. THE BEGINNING OF MODERN RULES (BIRTH OF CUSTOMARY INTERNATIONAL LAW).

Hugo Grotius: The Law of War & Peace (1625). Grotius wrote a comprehensive work on the rules of warfare. His work is especially important, because he addressed a wide array of questions and supported his conclusions with the works of other great scholars and sources (Cicero, Homer, Aristotle, Plato, the Bible, St. Augustine, and so on). Because his work resembled a code of sorts, it was regarded as a statement of the accepted customs and practices of nation states (birth of Customary Law).

Civilian Protections. Although Grotius wrote that a state could legitimately enslave or inflict injury upon captured warriors, he stated that women and children were to be spared, and civilian drinking water should be left free of poison. A number of his rules also demanded moderation and protection of civilian property and cultural property.

Importance of Grotius' Work. His work was regarded as the first widely recognized statement of the customs and practices of nations.

What Grotius' Rules Were Not. The rules were not a treaty or a binding collection of laws.

THE LIEBER CODE (24 APRIL 1863).

Dr. Francis Lieber "laid the cornerstone on which the laws of war, as we find them, are based."¹⁸ His work, *Instructions For The Government of Armies of the United States In the Field By Order of the Secretary of War, published as General Orders No. 100*¹⁹ is referred to as the Lieber Code.

¹⁸Telford Taylor, Foreword to Leon Friedmans, *The Law of War--A Documentary History--Volume I* xv, (1972).

¹⁹Id. General Halleck, General-in-Chief of the Union Army, requested that Lieber provide a set of rules for the troops in the field, consistent with international standards. The result was the "first systematic, written statement of the laws of land warfare."

The Code contained a number of provisions that provided for the protection of civilians:

Article IV. Because a soldier "possesses the power of arms against the unarmed" he must be "strictly guided by the principles of honor **and humanity**" in the administration of Martial Law.

Article XVI. "Military necessity does not admit of cruelty...the infliction of suffering for the sake of suffering or for revenge."

Article XXII. "The unarmed citizen is to be spared in person, property, and honor, **as much as the exigencies of war will permit.**"

Article XXIII. "Private citizens are no longer murdered, enslaved, or carried off to distant parts...."

However, the Code permitted a number of acts that are "inconsistent" with current law:

Article XVIII. A commander may drive civilians back into a besieged place to force the defending commander to share his food, regardless of the effect upon the civilians."²⁰

Article XXVI. A commander may force a civilian to swear an oath of loyalty or allegiance.²¹

IMPORTANCE OF LIEBER CODE.

²⁰Articles 3, 16, 24, 27, 32, 33 and especially Article 55 of Geneva Convention Relative to the Protection of Civilian persons in Time of War forbid any act that might place a civilian in danger of starving or wanting for medical care.

²¹Article 45, Annex to Hague Convention IV. "It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile power."

INTERNATIONAL STANDARD. Lieber's work became the international standard of the 19th century, and inspired similar manuals by other nations.²²

INSPIRED GROWTH OF CUSTOMARY LAW. The Lieber Code not only sparked introduction of Law of War military manuals, it inspired nations to acknowledge that there was in fact law that applied to regulating conflict.²³

MODERN MATURATION. As the nineteenth century drew to a close, a movement to codify the customary international law of war began to emerge. This movement eventually led to the major conventions that now regulate hostilities: the four Geneva Conventions and Hague Conventions (and regulations attached thereto). However, the customary law continued to develop alongside conventional law, and norms for the protection of civilians emerged in each of these categories.

Armed Conflict Period (1899-1991). Referred to as the pure Hague and Geneva Convention Period, this period saw the development of rules that protect civilians in the rigid category of international "war." Little attention was given to internal war and military operations short of war.

Operations Other Than War (OOTW) Period. After the closing days of the Persian Gulf War (Operation DESERT STORM), the national security strategies of the cold war shifted, resulting in active participation in multinational military operations that were frequently categorized as OOTW. The U.S. military recognized the immense significance of dealing with civilians during these operations. Consequently, the informal evolution of CPL began. The remainder of this outline discusses this development and the CPL components.

²²Gerhard von Glahn, *Law Among Nations* 733 (1992).

²³The impact of Lieber's Code was demonstrated by the act of the Confederate States of America that immediately upon receiving notice of General Order 100, passed a law that made the Code binding upon Confederate troops. Portions of this law were frequently reissued by individual commanders. For example, General R.E. Lee issued General Order No. 72 prior to the Gettysburg Campaign that forbid any misdeed against the person or property of Northern civilians.

Two Approaches To The Protection of Civilians. Two methodologies for the protection of noncombatants developed under customary international law.

The Targeting Method. Noncombatants that are not in the hands of an enemy force (the force employing the weapon systems restricted by the targeting method) are protected by restricting the types of assaults that may be directed at their location. This method is governed primarily by the customary rules of military necessity, superfluous suffering/devastation, and proportionality (especially as these rules have been codified within the Hague Regulations).

The Protect and Respect Method. The key to this method is to safeguard noncombatants that are in your hands (physically under your control or authority).

Development of the Law.

Separate Development. In regard to civilians, the Targeting Method developed much faster. By the turn of the 20th century, this body of law was well developed, understood, and recognized (e.g., Hague Regulations). It was not until the 1929 Geneva Conventions were negotiated that the second method gained widespread recognition. This method developed to a status of customary international law between 1929 and 1945, and was codified with the 1949 Geneva Conventions and the addition of the Fourth Geneva Convention.

Consolidated Development. The advent of the two protocols to the 1949 Geneva Conventions, which include provisions based on both methods, demonstrates the concurrent development of the two methods. For example, the provisions of Protocol I include:

Civilians are to be protected from the dangers arising from military actions (art. 51, para. 1). In addition, Section III of Protocol I provides comprehensive protections for all civilians within the (under the control of) power of a party to the conflict.

Indiscriminate²⁴ attacks against a civilian population are forbidden (art. 51, para. 4). In addition, constant care must be taken to spare the civilian population, civilian objects, and the individual civilians themselves from attack (art. 57). This is done by:

doing everything that is feasible to verify that the object of an attack is not civilian in nature;

taking all feasible precautions in the choice of means and methods of attack; and

refraining from any attack that would cause excessive loss/damage to civilian life or property.

Among targets that should achieve similar military advantage, always selecting the target that will cause the least civilian loss.

III. HAGUE CONVENTION NO. IV & ANNEX (H.R.) 18 OCT 1907.

STILL GOOD LAW. Most of the provisions have evolved to customary international law status.

LIMITED APPLICATION. Because civilians were generally considered outside the scope of warfare,²⁵ includes only a limited number of rules which protect civilians.

²⁴ Indiscriminate is defined as (1) those not directed at a specific military target, (2) employ a method or means of attack which cannot be directed at a specific target, or (3) employ means of combat that cannot be limited in its effect.

²⁵ Adam Roberts & Richard Guelff, Documents on the Laws of War 271 (1982). World War I demonstrated that civilians were often in more danger than combatants during armed conflict. Yet, during the 1929 Geneva Conference, no recommendation was made to revise or enlarge these provisions. In fact, those present only called for a study of the possible need for such rules.

NONCOMBATANTS? This term is used throughout these rules. However, although most contemporary commentators use the term noncombatant to refer to civilians, the meaning of the term as used in this convention varies. While a strict legal definition of noncombatant would also include other categories of protected persons (PWs, wounded & sick, medics, etc.), careful analysis of each rule employing this term is necessary to determine the subject of protection within the rule.²⁶

STRUCTURE. Protection of civilian noncombatants is divided into two areas:

During Hostilities (arts. 22 - 41).

During Occupation (arts. 42 - 56).

DURING HOSTILITIES:

No seizure or destruction of civilian property unless "imperatively" demanded by military necessity. H.R. Art. 23.

No use of arms and projectiles (against population centers) calculated to cause "unnecessary suffering." H.R. Art. 23.²⁷

No bombardment of "undefended" places. H.R. Art. 25.

²⁶See Dep't of Navy, Naval Warfare Publication 9 (Rev. A), The Commander's Handbook on the Law of Naval Operations, para. 11-1 (October 1989) [hereinafter FMFM 1-10].

²⁷This provision generates debate relative to the use of carpet bombing of cities, even if the object of the attack is a purely military target. The use of precision munitions during the Desert Storm attacks on Baghdad underlined the effort to avoid "unnecessary suffering" and to use weapons that do not violate the rule of "proportionality," when going after military targets located within population centers. This issue is now even more important with the advent of the 1977 Protocols to the Geneva Conventions (which upgrades the standard of care for the attacker).

No forcing enemy nationals to assist in the war effort against their own nation.
H.R. Art. 23.

All necessary measures must be taken to spare, "as far as possible," religious,
medical, or cultural structures. H.R. Art. 27.

All necessary measures must be taken to spare, "as much as possible," places (not
necessarily hospitals or medical facilities) where the wounded and sick are
collected. H.R. Art. 27.

No pillaging. H.R. Art. 28.

DURING OCCUPATION²⁸: (Occupation defined: a "territory is considered occupied
when it is actually placed under the authority of the hostile army." H.R. Art. 42).

Duty to ensure public safety. H.R. Art. 43.

No coercion of information. H.R. Art. 44.

No forcing inhabitants of occupied territory to swear an oath of allegiance. H.R.
Art. 45.

Family honor, property rights, and religious freedom must be respected. H.R. Art.
46.

No pillaging. H.R. Art. 47.

No general punishment for the acts of an individual, subgroup, or group. H.R.
Art. 50.

Nine Commandments of Property Use During Occupation:

²⁸"Territory is considered occupied when it is actually placed
under the authority of the hostile army." H.R. Art. 42.

Destroy, take or damage only based upon military necessity. H.R. Art. 23 (g).

No Pillaging (Taking Property By Violence). H.R. Art. 47.

State Property May Normally be Confiscated (Permanent Taking). H.R. Art. 46.

Private Movable Property May be Seized/Requisitioned (taken without payment/taken with payment or receipt) if Susceptible of Direct Military Use.

Requisitions shall only be made upon order of the commander of locality occupied. H.R. Art. 52.

Private Real Property May NOT be Seized.

No Private Property May be Confiscated. H.R. Art. 46.

All Vehicles & Equipment Used to Transmit Information May be Seized (Whether Privately Owned or Not).

Cultural & Religious Property, & Educational Centers Shall be Regarded as Private Property. H.R. Art. 56.

GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (G.C.) OR (GENEVA IV).

INTRODUCTION.

Geneva IV, and its three sister conventions, resulted from the bitter lessons of World War II (Hague IV did not provide enough protections).

Geneva IV is the first international agreement to exclusively address the treatment of civilians.

Does not replace Hague IV, it "supplements" it. G.C. Art. 154. However, Geneva IV is the principle law in this area.

Geneva IV is considered customary law. Thus, it is binding on any belligerent, whether a signatory or not. DA PAM 27-161-2 states that Geneva IV has "in large part superseded" the customary law.²⁹

THE STRUCTURE OF GENEVA IV.

A firm grasp of the G.C.'s structure is the most important learning objective relative to the G.C.

The Analytical Template (based upon four questions).

Is this an armed conflict?

If so, is it an International armed conflict?

If so, are the people in question protected persons?

If so, are they in enemy or occupied territory?

Regardless of the answer to each of the four questions, any person (and all persons) have some degree of protection under international law.

The degree of protection and the source of law that provides the protection depends upon which questions are answered affirmatively.

TEMPLATE APPLIED.

²⁹There is still some debate relative to the customary law status of the four Geneva Conventions. Meron, The Geneva Conventions as Customary Law, 81 Am. J. Int'l. L. 348 (1987).

No armed conflict = No application of the Law of War.

Internal armed conflict = Only common article 3 applies (Protocol II as guidance only, because U.S. has not yet ratified).

International armed conflict (unprotected person) = common article 3 "type" protections and Part II of the GC.

Common Article 3 is applied even to international conflicts because of a 1986 International Court of Justice opinion holding that it is a "minimum yardstick of protections to be afforded to all civilians in any type of conflict." Thus, Common Article 3 is part of the Human Rights Regime. The emerging customary law rule is that these type of protections apply without regard to the type of conflict. The U.S. applies the type of protections across the entire operational spectrum (war, conflict, and peace).

International armed conflict (protected person) = all of the above + heightened protections of the GC (Part III Protections, at least Section I).

International armed conflict (protected persons in enemy territory) = foregoing protections, plus protections found in GC, Part III, Sections I and II.

International armed conflict (protected persons in occupied territory) = foregoing protections, plus Part III, Sections I and III.

STRUCTURE OF GENEVA IV -- PART I (COMMON ARTICLES & GENERAL PROVISIONS).

Sets out the when, how, where of application, the end of application, and who will supervise application (Protecting Powers).

Also provides definition of protected person and how and when a protected person loses that status.

The first three articles of each of the four conventions are common to each convention and are referred to as the Common Articles.

Common Article 2 makes each Convention applicable during:

a declared war,

time of international armed conflict, and

period of occupation.

Common Article 3 (**MINIATURE CONVENTION**)³⁰ makes certain minimum protections applicable during an internal conflict (civil war).³¹

no adverse distinction based upon race, religion, sex, etc.;

no violence to life or person;

no taking hostages;

no degrading treatment;

no passing of sentences in absence of fair trial, and;

the wounded and sick must be cared for.

³⁰Originally, the contracting powers discussed making the entire Convention applicable to internal conflicts. Common Article 3 represented a compromise, wherein, a limited number of basic human rights/protections were left intact. Jean S. Pictet, The Geneva Conventions of 12 August 1949--International Committee of the Red Cross Commentary to Geneva Convention No. IV, 25-34 (1958).

³¹This provision has gained importance given the sharp rise in the number of self-determination movements.

STRUCTURE OF GENEVA IV -- PART II (GENERAL PROTECTIONS FOR "THE WHOLE POPULATIONS").

Broadest Possible Application: Protects wounded and sick; medical facilities, personnel, transports, and supplies; the infirm, expectant mothers, children, and family status.

Provides certain limited protections for **all persons** within the nations involved in a conflict (even a nation's own citizens and citizens of neutral states), and forbids distinctions based upon race, religion, or political opinion. (This is a clear example of the influence of WWII on the drafters of the Convention. Note the extension of international humanitarian law to the internal affairs of nations engaged in a conflict. Protection of the nation's own citizens, and the prohibition on race or religious based distinctions was a bold step for international law, based on true humanitarian motivation).

Prohibits only "adverse" distinctions. The drafters recognized that many legitimate distinctions were necessary. For instance, it is "normal to favour children, old people, and women."³²

Protections are vague and experts do not always agree as to the extent of the protection (if the protections were meant to be comprehensive, why are the comprehensive protections set out in the next part of the convention).

Unlike PART III (the main body of the G.C.), which is meant to protect civilians against the arbitrary actions of an enemy under whose control they fall, PART II is meant to provide protections for certain civilians against the actions of any party to the conflict (belligerent), even if not under the Article 4 definition of a protected person. BLUF: THESE PROTECTIONS APPLY TO CERTAIN CIVILIANS WHO, REGARDLESS OF WHAT PARTY OF THE CONFLICT IS IN CONTROL OF THEM.

³²See Pictet, *supra* note 13, at 119.

PERSONS WITH PART II PROTECTION. Note: these persons are not necessarily "protected persons" as described by article 4, and protected under Part III of the Convention. However, they can fall under the definition of "protected persons," and yet still fall under the wider application of Part II.

Categories With Clear Protection Include:

Expectant mothers (G.C. Arts. 16, 17, 23).

The Wounded, Sick & Infirm (G.C. Arts. 16, 17, 23).

Ministers & Medical Personnel (G.C. Arts. 20 & 23).

Medical Transport Personnel (G.C. Art. 20).

Orphaned Children Under the Age of 15 (G.C. Art. 24).

Categories of Persons with Less Protection.

The G.C. (Art. 17) **directs** the parties to the conflict to "endeavour to conclude local agreements for safe removal from besieged areas," the following categories:

the aged;

all children;

maternity cases; and

ministers.

The G.C. (Art. 14) **informs (does not direct)** parties to the conflict that they may establish zones/areas of protection, by mutual agreement, for:

mothers of children under seven;

the wounded, sick, and infirm;

aged;

children under the age of 15; and

expectant mothers.

PROTECTED AREAS OR THINGS (UNDER PART II).

HOSPITAL ZONES &/OR SAFETY ZONES & LOCALITIES. G.C. Art. 14.

Generally of a permanent nature, established outside the combat zone.

May be established before or during hostilities.

Must be established by agreement.

Hospital Zones serve to protect military or civilian wounded and sick;

Safety Zones serve to protect wounded, sick, aged, children under 15, and mothers of children under 7.

NEUTRALIZED ZONES. G.C. Art. 15.

Generally of a temporary nature, established within a combat zone.³³

Must be established by agreement (which shall fix duration of zone).

Serves to protect both civilians and combatant wounded and sick.

MEDICAL EQUIPMENT BEING TRANSPORTED TO BESIEGED OR ENCIRCLED AREAS. G.C. Art. 17.

CONVOYS OF VEHICLES, HOSPITAL TRAINS, & VESSELS, CONVOYING SICK, WOUNDED, INFIRM, OR PREGNANT CIVILIANS. G.C. Art. 21.

AIRCRAFT USED TO REMOVE SICK AND WOUNDED CIVILIANS. G.C. Art 22.

Protections Limited.

Only aircraft flying at previously agreed heights, times, and routes are protected.

Even protected aircraft must obey "every summons" from the ground.

Problems with this Rule.

Soldiers do not select "previously agreed upon heights, times, and routes" when getting shot, etc.

³³Unlike hospital or safety zones, neutral zones are designed to be based upon hasty decisions of combat leaders, within the combat zone. The military leaders on the ground are permitted to enter into these agreements. Pictet, *supra* note 13, at 130.

The drafters did not foresee the extent of the helicopter's use as a tool to evacuate the wounded.

CIVILIAN HOSPITALS. G.C. Arts. 18, 19, & 20.

Responsibilities:

Parties to conflict must provide civilian hospitals with certificates stating that structures are only used for medical purposes.

Parties must mark civilian hospitals with distinctive emblems.

Parties should situate hospitals as far as possible from any military objective.

Personnel involved in search for, transport, and care of the wounded, sick, infirm, and pregnant must carry a certificate and wear an arm band.

Full-Time Hospital Staff: identified by identity cards and armlets issued by the State.

Part-Time Hospital Staff: identified while actually performing duties by wearing an armlet.

Protections:

Civilian hospitals shall be respected and protected from attack.

Protections continue until the hospital is used for acts harmful to the enemy. Caring for sick or wounded soldiers or the presence of small arms is NOT considered harmful to the enemy.

Protection may not be lifted without "due warning," and;

A reasonable time limit.³⁴

SUPPLIES. G.C. Art. 23.

Free Passage for:

Hospital and medical supplies.

Objects necessary for worship.

Essential foodstuffs, clothing, and tonics intended for children under 15, pregnant women, and maternity cases.

Limitations on Protection:

Party permitting passage "must be satisfied that there are no serious reasons for fearing" that the supplies may be diverted to a military purpose.

³⁴This requirement raised interesting issues during Operation Desert Storm. Questions relative to the targeting of civilian hospitals used for military purposes were common. American commanders wanted to know if they must provide Iraqi forces with an opportunity to remove war making facilities and equipment before targeting such facilities. In other words, must Parties to the conflict always give up the element of surprise (as might be required by military necessity) in order to comply with Geneva IV, Article 19). America's answer was yes.

Party permitting passage may make distribution conditioned upon supervision by Protecting Powers.

STRUCTURE OF GENEVA IV -- PART III (GENERAL TREATMENT OF PROTECTED PERSONS).

This part is broken into five sections. Sections I, II, and III specify rules specifically based on where a protected person is found. The fourth details rules for internment.

Section I. Common Provisions. Provides general protections to “protected persons,” whether they are in (1) a Territory of a Belligerent or (2) Occupied Territory.

Section II. Protections For Aliens (Protected Persons) in the Territory of a Belligerent.

Section III. Protections for "Protected Persons" in Occupied Territory.

Section IV. Rules for the Treatment of Internees.

PERSONS PROTECTED (G.C. Art. 4, Para. 1).

Generally. "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever find themselves, in case of conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals."

In Plain English. There are two main classes of protected persons:

enemy nationals within the hands of a party to the conflict.

the whole population of occupied territories (excluding nationals of the Occupying Power or a co-belligerent).

Baseline Protections? Part III provides protections based upon the status of the piece of real estate upon which a given civilian stands. However, Article 27 provides a baseline package of protections that all protected persons are entitled to.

THOSE NOT PROTECTED.

Nationals of the Occupying or Hostile Force. But they do enjoy the minimum rights and protections of Common Article 3 and Part II.

Nationals of a Party Not Bound by the Convention. This is based on the language of the Convention. However, they are still protected to the extent G.C. is customary law, which has increased since 1947.

Nationals of a Neutral State (If that state has normal diplomatic representation within the occupying or hostile state). BUT...this exception does not apply in occupied territories. Here "neutrals" are protected persons, whether normal diplomatic relations exist between their government and the occupying power or not.

Nationals of a Co-belligerent (An Ally) (If that state has normal diplomatic representation within the occupying or hostile state). It was assumed that they do not need protection.

Example: In the case of WW II, once war commenced, a German national residing in Britain was a "protected person." Later in the war, that same German national, if he had returned to Germany, becomes a "protected person" once again as soon as Britain occupies the area of Germany where he is located. However, a Swiss national, be he in Britain, or in Germany, is not a "protected person." (Note that this neutral individual does become a protected person if he is in an area of occupation). Nor is a U.S. national in Britain, or an Italian national in Germany, because in both cases, they are in the territory of a co-belligerent. Note, however, that once Britain occupies Germany, that same Italian national would become a "protected person" if he was in the area occupied.

Persons Protected by Any of the Other Three Conventions.

Partisans. If a Power decides that members of a resistance movement do not satisfy the requirements of Geneva III to be classified as a Prisoners of War (PWs), then they should be considered protected persons under Geneva IV.³⁵ (He is still subject to punishment so long as he is afforded a fair and just trial).

Merchant Marine/Civil Aircraft. Normally, these persons are treated as PWs. However, Geneva III states that if they would enjoy "more favorable treatment" under any of the other provisions of international law, they should be granted the more favorable status. In some cases, Geneva IV might grant the most favorable treatment.

"BUT NO PERSON IS OUTSIDE THE LAW." As described above, there are certain baseline protections. Most commentators and nations assert that no person can "fall through the cracks" and not have the benefit of some degree of protection.

NOTE: ALL CIVILIANS ARE PROTECTED BY EITHER COMMON ARTICLE 3, PART II, OR THE MAIN BODY OF THE G.C.

THOSE WHO LOSE THEIR PROTECTED STATUS.

TWO VIEWS:

"Those that violate the laws of war are not entitled to claim its benefits."

"The Convention should apply to all persons, under all circumstances."

THE RULE (A Compromise): A person suspected of "activities hostile to the security of the State," does not enjoy any right that might prejudice the security of the State. G.C. Art. 5, Para. 1.

³⁵This does not mean that they cannot be punished for their acts. But punishment, if any, must be imposed pursuant to a trial held under the provisions of G.C. Art. 64.

Spies/saboteurs given as a specific example. Such persons forfeit their rights of communication. G.C. Art. 5, Para. 2.

Article 29 of Hague IV provides the current definition of a spy: "A person can be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intent of communicating it to the hostile party."

Thus, soldiers, not wearing a disguise, acting behind enemy lines, obtaining information, are not spies.

But civilians who seek information in the territory of a belligerent under the circumstances described above, may lose their status (in an occupied territory the civilian loses his status only if "absolute military security so requires").

Minimum Standards of Humanity. Even these persons shall be treated within the limits of the minimum standards of humanity (Article 3 type treatment). G.C. Art. 5, Para. 3. This is consistent with Article 30 of Hague IV, which demands that those accused of spying receive a trial.

Return of Full Status. Their full status as a protected person must be restored as soon as consistent with the security of the State. G.C. Art. 5, Para. 3.

PROTECTED PERSONS CANNOT RENOUNCE ANY PORTION OF THEIR PROTECTED STATUS. G.C. Art 8.

STATUS AND TREATMENT OF PROTECTED PERSONS -- SECTION I PROTECTIONS.

"PROTECTED PERSONS ARE ENTITLED, IN ALL CIRCUMSTANCES, TO RESPECT FOR THEIR PERSONS, THEIR HONOR, THEIR FAMILY RIGHTS, THEIR RELIGIOUS CONVICTIONS AND PRACTICES, AND THEIR MANNERS AND CUSTOMS. THEY SHALL AT ALL TIMES BE HUMANELY TREATED." G.C. Art. 27.

WHAT DID THE SIGNATORIES INTEND?

"Respect For Their Persons." Intended to grant a wide array of rights to protect physical, moral, and intellectual integrities.

Physical Integrity. Acts which threaten health or life are prohibited.³⁶

Moral & Intellectual Integrity. Disrespect for the structure of convictions and beliefs peculiar to each person is prohibited.

Respect for Honor." Acts such as slander, insults, and humiliation are prohibited.

"Respect for Family Rights." Arbitrary acts which interfere with marital ties, the family dwelling, and family ties are prohibited. This is reinforced by Geneva IV, Article 82, that requires that, in the case of internment, that families be housed together.³⁷

"Respect for Religious Convictions." Arbitrary acts which interfere with the observances, services, and rites are prohibited (only acts necessary for maintenance of public order/safety are permitted).

Aliens in Territory of Party to Conflict. The Party must allow the free practice of their religion and provide spiritual assistance (ministers of their faith). G.C. Art. 38.

³⁶The right to life is not specifically referred to as it was in H.R. Art. 46. But all commentators agree that it is implied, otherwise the entire provision would be valueless. In addition, the death penalty may only be applied to a protected person under the circumstances discussed in G.C. Art. 68 (espionage, serious acts of sabotage, and intentional crimes which cause the death of others), and may never be applied to children under 18.

³⁷In addition, if a family is divided, as a result of war time events, they must be reunited. See Pictet, *supra* Note 13, at 202-203.

Persons in Occupied Territories. The Occupying Power must permit the free exercise of religion and permit ministers to give spiritual assistance. The Power must also allow the free flow of religious materials and books. G.C. Art. 58. & H.R. Art. 46.

"Respect for Custom." Intended to protect the class of behavior which defines a particular culture. This provision was introduced in response to the attempts by World War II Powers to effect "cultural genocide."

SPECIFIC PROTECTIONS COMMON TO EITHER (1) TERRITORIES OF THE BELLIGERENTS OR (2) OCCUPIED TERRITORY. The Following acts are prohibited:

Insults and exposure to public curiosity. G.C. Art. 27.

Rape, enforced prostitution, and indecent assault on women. G.C. Art. 27.³⁸

Using physical presence of persons to make a place immune from attack. G.C. Art. 28.

Physical or moral coercion, particularly to obtain information. G.C. Arts. 31 & 33 and H.R. Art 44.

Actions causing physical suffering, intimidation, or extermination; including murder, torture, corporal punishment, mutilation, brutality, and medical/scientific experimentation. G.C. Art. 32.

³⁸These protections were intended as specific examples of the heightened protection that women enjoy under Geneva IV. The general protections within the Convention cover much more than the specific protections against rape, prostitution, and indecent assault. See Commission of Government Experts for the Study of the Convention for the Protection of War Victims (Geneva, Apr. 14-26). Preliminary Documents, Vol. III 47 (1947).

Measures of Brutality. This prohibition was intended to prevent acts other than the specific acts discussed immediately above. It grants the same type of sweeping protection that the "no violence" prohibition of Article 27 bestows. It also forbids such acts, whether applied by military or civilian agents.

Pillaging (under any circumstances and at any location). G.C. Art. 33 and H.R. Arts. 28 & 47.

Collective penalties. G.C. Art. 33.

Reprisals against the person or his property. G.C. Art. 33.

Taking of hostages. G.C. Art. 34.

The prohibitions on (1) collective punishment, (2) reprisals, and (3) taking of hostages were permitted in the customary law and to a large extent in Hague IV. Geneva IV represents a radical change in these areas.

All protected persons are to be treated "with ... consideration ... without any adverse distinction based, in particular, on race, religion, or political opinion." G.C. Art. 27.

The Right to Lodge a Complaint. G.C. Art. 30.

If the rights of a protected person are infringed, such a person has the right to complain to the Protecting Powers, the ICRC, or any equivalent national society.

No adverse action may be imposed upon such a person because of the complaint by the detaining power or occupying power.

ALIENS WITHIN THE TERRITORY OF A PARTY TO THE CONFLICT --SECTION II PROTECTIONS.

GENERAL RULES.

Enjoy many of the same rights as nationals within an occupied territory.

Articles 35 through 46 are designed to protect the freedom of the alien "in so far as that freedom is not incompatible with the security of the party in whose country he is."³⁹

RIGHTS AND PROTECTIONS.

Right to Leave the Territory. G.C. Art. 35.

Not an absolute right.

Right is overcome by the national interests of the State (Security).

There must be some type of system set up to quickly consider departure requests.

Right to Humane Treatment During Confinement. Protected persons are entitled to the quality of treatment recognized by the civilized world, even if it exceeds the quality of treatment that a Detaining Power grants to its own citizens. G.C. Art. 37.

Right to Pursue Employment. G.C. Art. 39.

Limitations on the Type and Nature of Labor.

Can only be compelled to work to the same extent as nationals.

Entitled to same work conditions (wages, hours, clothing, health care, etc.) and safeguards as national workers.

If protected persons are enemy nationals, they cannot be forced to contribute to the war effort of their enemy.

³⁹See Dep't of Army, Pamphlet 27-161-2, International Law, Volume II (23 October 1962).

G.C. Arts. 39 & 40.

Assigned Residence (Deprivation of Liberty).

What does Assigned Residence Mean?

The ICRC definition: forcing protected persons to live in a secured locality, where supervision is more easily exercised.

May include restrictions on where and when a protected person can go.

But it is not confinement or internment.

G.C. Art. 41.

May only be ordered if the security of the Detaining Power makes it **absolutely necessary**. G.C. Art. 42.

A protected person is entitled to have a decision placing him in an assigned residence reconsidered by a board/court created by the Detaining Power. G.C. Art. 43.

Even if the restricted/assigned person does not request reconsideration by the board/court, that authority must reconsider the initial decision, TWICE A YEAR. G.C. Art. 43.⁴⁰

Internment.

⁴⁰While this review is mandatory in the territory of a belligerent, it is optional in occupied territory.

What does internment mean? The ICRC states that it is more restrictive than assigned residence and "implies an obligation to live in a camp."

Separate from PWs and Criminals. Internees "shall be accommodated separately from prisoners of war and persons deprived of liberty for any other reason." G.C. Art. 84.

Grouped as Families Whenever Possible. G.C. Art. 82.

Internment Camps Must be Marked (to protect against attack). G.C. Art. 83.

Internment may be voluntary. What is Voluntary Internment?
Three requirements:

Requested by internee.

Request made through protecting powers (prevents detaining power from abusing rules).

Must be warranted by circumstances.

No Greater Step Permitted. Even if the detaining Power finds that neither internment nor assigned residence serves as an adequate measure of control, it may not use any measure of control that is more severe. G.C. Art. 41.

PROTECTED PERSONS IN OCCUPIED TERRITORIES.

DEFINITIONS & TERMS.

Invasion (FM 27-10, Para. 352a).

Invasion continues for as long as resistance is met. If no resistance is met, the state of invasion continues only until the invader takes firm control of the area, with an intention of holding it. Invasion is not necessarily occupation, but invasion usually precedes occupation.

Invasion may be either resisted or unresisted (see 2d below).

Occupation (FM 27-10, Para. 351). Territory is occupied "when it is actually placed under the authority of the hostile army."

Occupation = Invasion + Firm Control (FM 27-10, Para. 352a).

Occupation does "not include territory in which an armed force is located but has not assumed supreme authority."⁴¹

The Invasion element in OOTW. In recent OOTW, the U.S. has entered nations without resistance⁴², asserting that neither it nor its coalition partners were occupants. The assertion is usually based upon "permissive" entries (Operations URGENT FURY, JUST CAUSE, RESTORE DEMOCRACY) and the argument that no invasion ever occurs.

⁴¹Dep't of the Army, Pamphlet 27-5, Military Government and Civil Affairs, para. 1b (1944).

⁴²In Operation RESTORE DEMOCRACY, the U.S. entered Haiti under what the Department of State described as a "permissive environment." The official U.S. position is that this "unresisted" entrance did not amount to an invasion. However, a number of commentators have cited classical works on occupation and argued persuasively that the U.S. is an occupant.

Resisted v. Unresisted Invasion. Occupation "presupposes" a hostile invasion, which may be either resisted or unresisted. Recent OOTW have generated scenarios that have obscured the application of these terms. For example, what is the difference between a "coerced or forced entrance into a permissive environment"⁴³ and an unresisted invasion? If there is no difference, then the entering force becomes an occupant upon seizing firm control of some part of the territory.

Even assuming these scenarios are synonymous, the position that such operations do not fall within the category of International Armed Conflict, and therefore do not trigger Common Article 2, which has been asserted by the U.S. in past operations, would be another basis for inapplicability of the GC IV occupation rules do not apply

Subjugation (FM 27-10, Para. 353). Whereas Occupation is temporary or provisional control, subjugation (conquest) is permanent. It is a transfer of sovereignty.

Subjugation = Occupation + Permanent Control

Military Government⁴⁴ (FM 27-10, paras. 12 & 362). When the occupying power exercises governmental authority over the occupied territory (because the legitimate government is unable to administer the government).

⁴³A number of notable members of the Clinton Administration have categorized the U.S. presence in Haiti as "occupation." Special Advisor to the President on Haiti Lawrence A. Pezzullo states "to this date Aristide is not running the nation; the U.S. is in effective control of the nation. Not a single ministry in Haiti now operates. We are an army of occupation." Telephone interview with Former Ambassador Lawrence A. Pezzullo, recent Special Advisor to the President on Haiti (Dec. 15, 1994).

⁴⁴See von Glahn, *Supra* note 5, at 770. The Department of the Army announced on June 9, 1959, that it had authorized the deletion of the term "military government." The term "civil affairs" was offered (and has been used exclusively since) in its stead.

Civil Affairs Administration (FM 27-10, Para. 354).

Martial Law (FM 27-10, Para. 12). Unlike Military Government, Martial Law is only applied domestically, and not on the soil of a formally belligerent state.

COMMENCEMENT OF OCCUPATION.

Proclamation of Occupation (FM 27-10, para. 357). General Eisenhower issued a powerful proclamation. Is this required? NO. Should we do it?

Without such a proclamation, commencement is a Question of Fact (FM 27-10, Paras. 355 & 356) (H.R. Art. 42).

Elements:

Invader has rendered the invaded government incapable of exercising its authority.

Invader has substituted its own authority.

Must be Actual & Effective.

Organized resistance has been overcome.

Invader has taken measures to establish authority.

The existence of resistance groups does not render the occupation ineffective.

The existence of a fort or defended place does not render the occupation of the remaining territory ineffective.

TERMINATION OF OCCUPATION (FM 27-10, Paras. 353, 360, & 361)
(G.C. Art. 6).

Upon subjugation.

Displacement of the occupying power.

Geneva IV applies within occupied territories until one year after the close of military operations or for the duration of the occupation (as to occupying powers), whichever is longer.

STATUS OF THE OCCUPIED TERRITORY.

Sovereignty. Does not pass to occupying power.

What Law is Applied?

Three Systems of Law Apply!

Indigenous Law (to the extent that it has not been
suspended by the occupying power).

The Law of the Occupying Power (its decrees, orders,
legislation, and proclamations, etc.).

Conventional and Customary International Law.

Suspension of Indigenous Laws. The local law (civil & penal) of the occupied territory "shall remain in force," except in cases where such laws "constitute a threat" to the occupying power's security. G.C. Art. 64.

Sources of Host Nation Law.

The Host Nation Constitution.

The Host Nation Penal Code (and Procedural Rules).

Special codes that deal with:

deprivation of liberty (detainee law)

deprivation of property.

Duty of Obedience. Inhabitants owe a duty of obedience to the occupant. However, this obligation does not require that a member of the local population act in a manner aimed to injure his displaced government.

Duty to Protect. The occupant must protect the inhabitants of occupied territory and their personal rights. H.R. Art. 46, G.C. Art. 27, and PR-I Arts. 72-77.

Other Hague Convention Duties:

Duty to ensure public safety. H.R. Art. 43.

No coercion of information. H.R. Art. 44.

No forcing inhabitants to swear an oath of allegiance. H.R. Art. 45.

Family honor, property rights, and religious freedom must be respected. H.R. Art. 46.

No pillaging. H.R. Art. 47.

No general punishment for acts of an individual, subgroup, or group. H.R. Art. 50.

No contributions (collection of money), except:

with commander-in-chief's written order, and

after providing a receipt.

H.R. Art. 51.

Functions of Local Government.

It might be smart to allow local government to perform many of its normal functions.

Local officials (or any other inhabitant) may not be forced to swear an oath of allegiance to hostile power. H.R. Art. 45.

Local officials may not be punished if they abstain from fulfilling their functions for reasons of conscience. G.C. Art. 54.

Local officials should be paid from the revenues of the local territory. FM 27-10, Para. 424.

Local officials may be removed from their posts. G.C. Art. 54.

Contributions and Taxes Levied by the Occupant.

Neither taxes nor contributions will be collected to enrich the occupying power.

Money must be collected for the benefit of the occupied state (cost of administration).

As much as possible, the existing rules of assessment should be used.

No new taxes, unless required by considerations of public safety/order.

Contributions (money that goes directly into occupant's hands to offset its expenses in administering the occupation government) can only be ordered by Commander-in-Chief (must be in writing).

Occupation Courts. The occupying power may constitute military courts (nonpolitical) to try accused citizens of an occupied territory. Limitations:

The courts must sit in the occupied territory.

Prosecution must be based upon laws that have been "published (in writing) and brought to the attention of the inhabitants."

The laws must be published in the native language.

No ex post facto prosecutions.

No sentence pronounced except after a "regular" trial.

No prosecution based upon offenses that occurred before occupation (except for violations of the laws of war).

Accused persons have right to present a defense and call witnesses. G.C. Art. 72.

Right to a qualified "advocate or counsel of their choice." Usually provided by Protecting Power, but if not the Occupying Power must, with the consent of the accused, supply counsel. G.C. Art. 72.

Right of Appeal. G.C. Art. 73.

Protecting Power shall have the right to Attend the Trial (must be notified of trial date).

Limitation on Use of Capital Punishment.

Six month delay (between receipt of notification of judgement by Protecting Power and execution).

Right to petition for pardon or reprieve.

FM 27-10, Paras. 433-445

Inviolability of Rights. The occupying power does not have the authority to deprive protected persons of any rights derived from Geneva IV as a result of occupation. This rule remains firm despite:

Agreements between the occupied government and the occupying power.

Any annexation (illegal anyway).⁴⁵

Any change in the government (persons cannot be deprived of rights by an occupying power that changes that nation's laws or constitution).

Immunity of Occupation Personnel From Local Law. Military and civilian personnel of occupying force are not subject to local law or jurisdiction of local courts.

⁴⁵During occupation the occupier does not succeed to any of the rights of sovereignty of the occupied state. The occupied state is not deprived of its statehood, only its ability to exercise the rights of statehood. Annexation is different. An annexed nation loses its identity and the annexing power succeeds to all of the rights of the extinct state. However, annexation cannot occur while hostilities continue. A decision on this point must be reached in a peace treaty. See Pictet, *supra* note 13, at 275.

RESTRICTIONS ON NATIVE POPULATION.

Generally. Many activities may be regulated or forbidden by the occupant, even if the acts do not violate laws of war.

Newspapers and Other Media. May be shut down or severely restricted.

Public Meetings. May be restricted or forbidden.

Travel. May be restricted or forbidden (exceptions for religious ministers & medical personnel).

Voting Privileges. May be suspended.

National Symbols (flag, song). May be forbidden. AR 190-57, para 2-10.

DEPRIVATION OF LIBERTY.

Four types of deprivation (see generally Rights of Protected Persons, this outline pp. 24-27):

detainment;

Internment;

Assigned residence;

Simple imprisonment (referred to as confinement in AR 190-57).⁴⁶
G.C. Arts. 68-71:

⁴⁶The distinction between confinement and internment is that those confined are generally limited to a jail cell ("CI camp stockade"), while internees remain free to roam within the confines of a internee camp. AR 190-57, para. 2-12.

includes pre/post-trial incarceration.

pretrial confinement must be deducted from any post-trial period of confinement.

a sentence of to imprisonment may be converted to a period of internment.

TREATMENT OF PROPERTY.⁴⁷

General Rule: The occupying power cannot destroy "real or personal property..., except where such destruction is rendered absolutely necessary". G.C. Art. 53.

Pillage. Defined as the "the act of taking property or money by violence." Also referred to as plundering, ravaging, or looting." G.C. Art. 33.

Forbidden in all circumstances (one of the general provision protections of Section I).

Punishable as a war crime or as a violation the UCMJ.

The property of a protected person may not be the object of a reprisal. G.C. Art. 33.

Control of Property. The property within an occupied territory may be controlled by the occupying power to the extent:

Necessary to prevent its use by hostile forces; or.

To prevent any use which is harmful to the occupying power.

NOTE: As soon as the threat subsides,

⁴⁷See Nine Commandments of Property Use printed under the Hague Regulations section of this outline.

private property must be returned.

FM 27-10, Para. 399.

What Happens to the Property of Internees (or those in "assigned residences")?

The occupying power must seize control.

Once the rightful owner is free to resume control of the property, it must be returned to them.

FM 27-10, Para. 399.

Seizure. The temporary taking of property, with or without the authorization of the local commander.

State Property.

Real Property of Direct Military Use (arsenals, forts, railways, bridges, airfields).⁴⁸

Real Property Not of a Direct Military Use may not be seized (but occupant may administer such property) and must be safeguarded (public buildings, real estate, forests).

Occupying power can seize all (STATE OWNED) cash, funds, and movable property, which is capable of military use.

Movable Property is given a liberal meaning and includes a very wide class of property.

⁴⁸Property that can easily be put to a military use is the category of property that is most likely to be legitimately destroyed, intentionally damaged, or used under Geneva IV, Article 53. This remains true whether the property is private or state owned.

FM 27-10. Paras. 402-405.

Private Property.

Permitted if the property has a DIRECT MILITARY USE.

A receipt must be given, so that restoration and compensation can be made.

Confiscation.

Defined. Permanent taking. Differs from seizure, which is temporary.

State Owned Property. State property seized or captured becomes the property of the capturing nation (title passes).

Private Property. Cannot be confiscated. In addition, threats, intimidation, or pressure cannot be used to circumvent this rule.

FM 27-10, Paras. 396 & 406. H.R. Art. 46, Para. 2.

Requisitions (FM 27-10, Paras. 412-417).

Defined. The use of services and property, by the order of the local commander, for the needs of the hostile or occupation army.

Procedure.

Must be in proportion to available resources.

Must not require population to participate in operations against their nation.⁴⁹

May only be ordered by local commander.

Must, to the greatest extent possible, be paid for in cash. If cash is not available a receipt must be given, with payment made as soon as possible.

Use of Force. Minimum amount required to secure needed services or items.

What May be Requisitioned?

Practically everything (fuel, food, lodging, materials, tools, vehicles).

Limitation. Food and medical supplies only if civilian population does not need the items taken. G.C. Art. 55.

CONCLUSION.

The Fourth Convention is a series of detailed rules. There is no substitute for digging into them to learn the legal requirements related to treatment of civilians.

While this Convention may not be technically applicable to future OOTW, the rules serve as a critical foundation for creating solutions to civilian protections issues through application of the CPL Fourth Tier/Law by Analogy process. Judge Advocate's must recognize this, attempt to anticipate the type of issues their unit will encounter, and develop a working knowledge of these rules as far in advance of such operations as possible.

⁴⁹FM 27-10, para. 420 provides a narrow explanation for this prohibition. Precludes requisitioning services upon "works directly promoting the ends of war" (construction of fortifications, military airfields, ammunition). However, these citizens may volunteer for any service.

International and Operational Law Department
The Judge Advocate General's School
Charlottesville, VA

LAW OF WAR: TREATY DEVELOPMENTS

REFERENCES

1. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 (hereinafter the 1954 Hague Convention).
2. The 1977 Protocols Additional to the Geneva Conventions, Dec. 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 (hereinafter Protocol I and II or GP I and II).
3. The 1980 Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1523 (hereinafter the Conventional Weapons Treaty).
4. 1993 Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (hereinafter the Chemical Weapons Convention or CWC).

III. INTRODUCTION.

A. Reasons for renewed interest in these LOW treaties.

5. Clinton Administration commitment. At the August 1993 International Conference for the Protection of War Victims in Geneva, Switzerland, convened by the Swiss government in response to a proposal by the International Committee of the Red Cross (ICRC), the concluding Declaration called on states to "consider or reconsider, in order to enhance the universal character of international humanitarian law" the 1954 Hague Cultural Property Convention, the 1977 Geneva Protocols, and the 1980 Conventional Weapons Convention. International Conference for the Protection of War Victims: Declaration for the Protection of War Victims, 33 I.L.M. 297 (1994). The conference was convened because of alarm about the widespread violations of international humanitarian law in conflicts such as those in the former Yugoslavia and Somalia. At the opening session of the conference, United States Delegate, Walter Zimmerman, stated that the US had already, in accordance with the draft of the aforementioned declaration, begun such a review. Protection of War Victims, Dep't St. Dispatch, Sept. 6, 1993, at 615.
2. The end of the Cold War and the subsequent move toward multilateralism also contributed to the US reconsideration of these conventions.
3. The attention paid to cultural property in Operation Desert Storm and in the conflicts in the former Yugoslavia has renewed interest in the 1954

Hague Cultural Property Convention.

- a. In a much-documented incident during Operation Desert Storm, the U.S. decided not to attack two Iraqi fighter aircraft which the Iraqis intentionally situated near the ancient Temple of Ur in an attempt to shield them from attack. Although Iraq's action clearly did not immunize the aircraft from attack and rendered Iraq responsible for any collateral damage to the temple, the US chose not to attack out of respect for the cultural property and a proportionality determination that placing the aircraft away from runways and maintenance facilities significantly reduced the military necessity of conducting such an attack. Final Report to Congress: Conduct of the Persian Gulf War, Dep't. Def., April 1992, at 615.
- b. The UN commission of experts investigating war crimes in the former Yugoslavia determined that the shelling of the city of Dubrovnik, Republic of Croatia by Yugoslavian National Army units from October to December 1991, and the destruction of the Mostar Bridge in Bosnia-Herzegovina by the Croatian Army on 9 November 1993, among other attacks throughout the former Yugoslavia, were not justified by military necessity and therefore disproportionate.
 - (1) The commission found that the cultural importance of the entire "old town" of Dubrovnik, consisting of numerous palaces, cathedrals, and monuments was well known, the "old town being on the UNESCO listing of "world cultural heritage" property, and that such targets were deliberately attacked.
 - (2) Built in the 16th Century, the commission noted the significant symbolic importance of the Mostar Bridge to the Muslims as a bridge between Muslim and Croatian communities. That being the case, the commission determined that the Croatian forces clearly knew of its cultural importance.
 - (3) In both instances the commission recommended both these attacks could be the basis for war crime prosecutions if the individuals responsible can be found. Final Report of the Commission of Experts Established by UNSCR 780, paras. 285 - 300, U.N. DOC. S/1994/674 (1994).

4. The significant number of civilian casualties from landmines has also focused US attention on the 1980 Conventional Weapons Convention landmine protocol (Protocol II). An estimated 80 to 100 million landmines have been sewn around the world during armed conflicts in countries such as Angola, Cambodia, Mozambique, etc. The US is taking an active role in attempting to deal with this problem. Hidden Killers: The Global Landmine Crisis, Dep't St. (1994).

IV. 1954 HAGUE CULTURAL PROPERTY CONVENTION.

A. Introduction

1. A product of the destruction and pillage of cultural property during WWII.
 - a. The Nazis deliberately and systematically committed offenses against cultural property. One of the most celebrated perpetrators of this destruction was Alfred Rosenberg, head of Einsatzstab (Special Staff) Rosenberg, who was accused, among others, of looting German-occupied nations, such as France, Belgium, Holland, Luxembourg, Norway, and the Soviet Union of cultural property. Rosenberg was tried for this extensive destruction of cultural property, among other offenses, found guilty and hung. Merryman, Two Ways of Thinking About Cultural Property, 80 A.J.I.L. 831 (1986).
 - b. From the Allied perspective, one of the most celebrated targeting incidents of the war involved the February 1944 air bombardment on the fortress abbey of Monte Cassino, a 17th Century monastery in Italy. The monastery, commanding high ground at the junction of two rivers was in a critical tactical position, and was the anchor for the western edge of the German "Gustav Line," the German defensive line stretching across the Italian peninsula defending the approaches to Rome. While the German 1st Parachute Division was dug in on the hill the abbey rested on, they were forbidden by their commander to actually enter the abbey. After two unsuccessful attacks on the Cassino position by American divisions commanded by General Mark Clark, and New Zealand and Indian divisions commanded by British General Bernard Freyberg, Allied commanders ordered the bombardment of the abbey. 135 Flying Fortresses blasted the abbey into rubble. The decision was controversial as some claimed that there was no military necessity

served by the attack. John Keegan, The Second World War, (1989); Weinberg, A World at Arms, 661 (1994); Churchill, Memoirs of the Second World War, 799 (1959); Merryman, supra, at 839.

- c. The incident prompted General Eisenhower to give the following direction to his forces preparing to move across northern Europe:

"Shortly we will be fighting our way across the Continent of Europe in battles designed to preserve our civilization. Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting preserve.

It is the responsibility of every commander to protect and respect these symbols whenever possible. In some circumstances the success of the military operation may be prejudiced in our reluctance to destroy these revered objects. Then, as at Cassino, where the enemy relied on our emotional attachments to shield his defense, the lives of our men are paramount. So, where military necessity dictates, commanders may order the required action even though it involves destruction to some honored site. But there are many circumstances in which damage and destruction are not necessary and cannot be justified. In such cases, through the exercise of restraint and discipline, commanders will preserve centers and objects of historical and cultural significance. Merryman, supra at 839.

- 2. Convened by the United Nations, specifically, the United Nations Educational, Scientific, and Cultural Organization (UNESCO).
- 3. First global attempt to comprehensively codify the rules regarding the treatment of cultural property during armed conflict. However, the concept of protecting cultural property is well established as evidenced by the following:
 - c. Articles 34 - 36, Lieber Instructions - 1863.
 - d. Articles 23(g), 27, 28, 48, and 56 of Hague IV (Land Warfare) Regulations, and article 5 of Hague IX (Bombardment by Naval Forces) - 1907.

- e. Hague Rules of Air Warfare - 1922/23 (although these rules were never adopted).
- f. Roerich Pact - 1935.
 - (1) North, Central, and South American nations are party to this treaty.
 - (2) 1954 Hague Convention supplements this treaty.

B. Key Provisions.

- 1. Art. 1: Definition of Cultural Property - very broad and inclusive. Fundamental premise of this convention is that cultural property, because it contributes to the cultural heritage of all mankind, deserves international protection. Merryman, supra, at 836. Such a broad definition avoids the problems of 1) the inevitable "slippery slope" if one were to try to distinguish the truly local items of cultural property from the items of more international stature: and 2) the problem of the item that subsequently and unexpectedly gains international prominence. Merryman, supra, at 837, fn. 21.
 - a. Movable or immovable property of great importance to the cultural heritage of every people, e.g. monuments, archaeological sites, groups of buildings of historical or artistic interest, works of art, scientific collections, and collections of books.
 - b. Buildings designed to exhibit or preserve movable cultural property, e.g. museums, libraries, and refuges.
 - c. Centers containing large amounts of cultural property.
 - d. Not applicable to items of "natural heritage," i.e. geographic, as opposed to man-made, landmarks.
- 2. Art. 18: Application of the Convention.
 - a. Except for those provisions expressly applicable in time of peace, the Convention applies in cases of international armed conflict or in cases of partial or total occupation.
 - b. In cases of non-international armed conflict, both forces are to **respect** cultural property.

3. Arts. 3 - 7: **General** Protections accorded to Cultural Property.
- a. **Safeguard** - In time of peace, parties are to take whatever actions are necessary to protect their cultural property.
 - b. **Respect** - In time of armed conflict, this protection has two components:
 - (1) Parties are to refrain from any use of cultural property on their own territory which would expose it to destruction or damage.
 - (2) Parties are not to attack such property.
 - (3) Both of these protections may be waived in cases of "imperative military necessity."
 - (4) The parties also undertake to prohibit theft, pillage, or any acts of vandalism directed against cultural property.
 - c. Parties may mark their cultural property with the convention's distinctive emblem.
 - d. Parties, during peacetime, are to introduce materials in their military regulations to further the adherence of their armed forces to the Convention. To facilitate this Parties are to have specialist personnel whose job is to secure respect for cultural property and to cooperate with civilian authorities responsible for safeguarding it.
 - (1) Civil Affairs units still maintain arts, monuments, and archives personnel in their units.
 - (2) These units are charged with preparing a list and a map of cultural property, educating personnel, preparing plans for the protection of cultural property, etc. Dep't of Army, Field Manual 41-10, Civil Affairs Operations, figure 4-10, 11 Jan. 1993.
4. Arts 8 & 11: **Special** Protections accorded to Cultural Property.

- a. Bestows immunity on specially designated pieces of cultural property provided they meet the following tests:
 - (1) Must be located an "adequate distance" from any military objective; and
 - (2) Must not be used for a military purpose.
- b. Special protection is granted only upon the entry of the property into the "International Register of Cultural Property under Special Protection."
 - (1) The entry comes only after all parties to the Convention are notified of the request and given an opportunity to object.
 - (2) These procedures are contained in the Regulations attached to the Convention.
- c. Contains exceptions in case of "exceptional cases of unavoidable military necessity" or if property used for a military purpose. Military necessity decision must be made, at least, at the division commander level.
- d. This protection was the only "new ground" broken by this Convention as the other provisions elaborated on existing obligations.
- e. This protection was also the primary obstacle to U.S. ratification.
 - (1) DOD objected to the special protection regime on the grounds ratification would limit US options in the event of a nuclear or conventional conflict. Specifically, DOD concerns were that enemies would make liberal use of it, thereby thwarting targeting plans, e.g. by designating the Kremlin as deserving special protection. Memorandum from W. Hays Parks to General Counsel, Office of the Secretary of Defense 7, (17 Sept. 1993) (on file at TJAGSA).
 - (2) These concerns, however, appeared to overlook the various procedural requirements for admission to the international register, the prohibition on the use of such property for a military purpose, and the military necessity exception. Id.

- (3) Furthermore, very few sites have actually been designated as "specially protected." They are the Vatican and art storage areas in Austria, Holland, and Germany. Id.

5. Article 23: Assistance of UNESCO.

- a. Parties may ask UNESCO for technical assistance to organize their protection of cultural property or with regard to any other problem connected with the convention.
- b. This provision has been invoked in June of 1970 when Cambodia requested technical assistance following the US invasion. UNESCO also sent a mission to Croatia in October 1991 to inventory the damage done to cultural property. UNESCO called on the Yugoslavian Army to cease its attacks on cultural property. Karen J. Detling, Note, Eternal Silence: The Destruction of Cultural Property in Yugoslavia, 17 Md. J. Int'l L. & Trade 41, 63 (1993).

6. Protocol to the Convention.

- a. This protocol calls on occupants to take steps to prevent the illegal exportation of cultural property from occupied territory.
- b. The US is concerned that the protocol could be interpreted as imposing such obligations on peacekeeping forces, forces which are not legally occupying forces and generally do not possess the resources of an occupying force. The US will submit an understanding to this effect if the treaty is ratified. Parks memorandum, supra, at 12.

C. Current Status of Convention.

1. International: 82 nations are now parties to the Convention.
2. United States.
 - a. The U.S. signed the treaty, but did not ratify it because of DOD objections.
 - b. DOD and DOS have recommended ratification of the Treaty.

Ratification is expected.

- c. It should also be noted that although the US is not yet a Party to this convention it did comply with its provisions during the Persian Gulf War. Final Report to Congress: Conduct of the Persian Gulf War, supra, at 606.

V. THE 1977 PROTOCOLS.

A. Introduction.

1. Protocols motivated by the International Committee of the Red Cross (ICRC).
 - a. ICRC acknowledged the existence of gaps in the four Geneva Conventions that became evident during the numerous conflicts, and the developments in modern weaponry, occurring after WWII.
 - b. Additionally, the law of the Hague, regulating the means and methods of warfare, had not been updated since 1907. Bothe, Partsch, Solf, New Rules for the Protection of War Victims 2 (1982).
 - c. The Protocols supplement, not supersede, the 1949 Geneva Conventions. Thus the provisions of the Protocols cannot be read and understood on their own; they must be read in conjunction with the relevant Geneva Conventions. Id.
2. Two Protocols.
 - a. Protocol I: dealing with international armed conflicts, or Geneva Convention (GC) "common article 2 conflicts."
 - b. Protocol II: dealing with non-international armed conflicts - roughly analogous to GC common article 3, although Protocol II has a narrower scope of application than does common article 3, as will be discussed later.
 - c. Protocols were the product of a Swiss- organized diplomatic

conference which had four meetings between 1974 and 1977.

- (1) Attended by approximately 120 nations.
- (2) Also attended by 11 national liberation movements (e.g. PLO, ANC) and 51 inter-governmental and non-governmental organizations.

B. Protocol I: Key Provisions.

1. Scope of application. Article 1.

- a. Geneva Convention common article 2 international armed conflicts.
- b. Plus, those conflicts in which peoples are fighting against Colonial domination, Alien occupation, and Racist regimes in the exercise of their right of self-determination (so-called CAR conflicts).
 - (1) This provision provoked a rift between Western and Third World nations.
 - (a) Western nations viewed the article as a reincarnation of the "Just War" concept, in which the Protocol's applicability turned on the motives of the rebel forces. It results in the politicization of humanitarian law which is inconsistent with what is supposed to be an impartial body of law and the UN Charter. It also legitimizes foreign intervention in these type of conflicts. U.S. holds this view.
 - (b) Third world nations viewed these conflicts as being essentially international in scope, pitting local populations v. foreign governments.

2. Art 5: Protecting Powers.

- a. Establishes, for the first time, procedures for Parties to a conflict to follow in designating Protecting Powers, the mechanism set up by the Geneva Conventions (common articles 8 - 10 of the first three Conventions) to ensure compliance with the Geneva Conventions.
- b. The article also establishes that Parties must accept the ICRC, or any other impartial organization, as a substitute if no Protecting Power can be agreed upon; however, the actual functioning of the

ICRC as a substitute for a Protecting Power still requires the consent of the Parties to the conflict (the latter requirement somewhat diminishes the impact of this provision).

3. Arts 8 - 20: Wounded and Sick Provisions.
 - a. Provides definition of "wounded and sick:" a serviceman or civilian, who because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.
 - b. Extends GC protections to civilian medical personnel and facilities, i.e. they shall be respected and protected.
4. Arts 24 - 31: Protection of Medical Aircraft.
 - a. A product of the U.S. medevac helicopter experience in Vietnam.
 - b. Provides greater protection to these aircraft by improving means of identification and according them immunity from attack in certain areas of the battlefield once identified.
 - c. However, still relies heavily on a "safe passage" agreement between parties, which is difficult to arrange on the battlefield.
5. Arts 32 - 34: Missing and Dead Persons.
 - a. Requires parties to search for those persons reported as missing by an adverse party, "as soon as circumstances permit, and at the latest from the end of active hostilities." Any information found is to be forwarded via the Protecting Power or the ICRC.
 - b. Requires parties, as soon as possible, to negotiate agreements to permit access to gravesites or to return remains of deceased.
6. Arts 43 - 44: Irregular combatants and PW Status.
 - a. Another very controversial provision.
 - b. Provisions reduce the traditional Geneva Convention (GC) criteria for irregulars achieving combatant, and subsequently, PW status.

Those four criteria are:

- 1) Commanded by a person responsible for his/her subordinates.
 - 2) Wearing a fixed distinctive symbol.
 - 3) Carrying arms openly.
 - 4) Conducting operations in accordance with the Law of War.
- c. Only requirement that clearly remains in GPI is carrying arms openly in a military engagement or when visible to the adversary while engaged in a military deployment preceding the launching of an attack. (GPI, Art 44(3))
 - d. The intent of the drafters was to provide incentive for irregulars to comply with the LOW, by making it easier to obtain combatant status.
 - e. Critics argue this blurs the critical distinction between the irregular and the civilian. The U.S. shares this objection.
7. Art 47: Mercenaries.
 - a. This article denies combatant and PW status to those persons meeting the definition of a mercenary as set forth in the article.
 - b. There is some U.S. criticism of this provision because it denies humanitarian protections to a category of persons on the battlefield - a circumstance which is considered inconsistent with the principle of humanity. This provision is thus considered to be another example, like article 1(4) of the politicization of the Law of War.
5. Arts 51 - 56: Reprisals.
 - a. Extends prohibitions against reprisals to the following potential targets:
 - 1) The entire civilian population.
 - 2) Civilian property.

- 3) Cultural property.
 - 4) Objects indispensable to the survival of the civilian population, e.g. food, livestock, drinking water.
 - 5) The natural environment.
 - 6) Dams, dikes, nuclear power plants, i.e., "installations containing dangerous forces."
- b. U.S. concerned that these provisions eliminate reprisals as a viable deterrent. The only appropriate target of a reprisal appears to be enemy soldiers or enemy military facilities.
6. Article 51: Protection of the Civilian Population.
- a. Codifies the rule of proportionality: Prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."
 - b. Recognizes that collateral damage to objects, e.g. hospitals, may be unavoidable.
7. Article 56: Protection of Works and Installations Containing Dangerous forces.
- a. Prohibits attacks against dams, dikes, and nuclear facilities if such an attack may cause severe civilian losses.
 - b. An exception to this prohibition if the installation is providing regular, significant, and direct support to military operations.
 - c. U.S. objects to this provision because it imposes an absolute standard on the commander, i.e., he must be absolutely certain severe losses will not occur, and it raises the standard for military necessity, i.e., from making an effective contribution to military action to providing regular, significant, and direct support to military action.

8. Articles 76 - 77: Protection of Women and Children.

- a. Both are to be the object of special respect and protection.
- b. Expands GC protection to all women and children, not just those that qualify for GC "protected person" status.

9. Article 82: Legal Advisers.

- a. States that Parties shall make legal advisers available to their commanders to advise them on the application of the Geneva Conventions and the Protocols and to provide instruction to the troops on the same subject.

C. Protocol II. Key Provisions.

1. Article 1: Scope of Application.

- a. While this Protocol was intended to "develop and supplement" common article 3 of the Geneva Conventions, it actually has a narrower application.
- b. The Protocol applies to armed conflicts occurring within the territory of a Party between its armed forces and dissident forces that meet the following criteria:
 - (1) Organized and under responsible command;
 - (2) Exercise control over part of the Party's territory;
 - (3) Able to carry out sustained military operations and to implement this Protocol.
- c. These criteria were added to pacify several nations concerned about foreign interference in sovereign affairs.
- d. U.S. intends to apply Protocol II to all conflicts covered by common article 3.

2. Remaining Articles.

- a. Articles 4 - 5 accord basic human rights protections to non-combatants, including specific provisions on children and detainees.
- b. Articles 7 - 11 state that the wounded and sick, as well as medical personnel and units, are to be respected and protected.
- c. Articles 13 - 17 bestow various protections on civilian populations and civilian objects, e.g., no targeting of civilians and no forced movements of civilians.

D. Current Status.

1. International.

- a. 147 nations have become Parties to GPI.
- b. 139 nations have become Parties to GPII.

2. United States.

- a. In 1987 President Reagan decided not to seek ratification of Protocol I, primarily because of objections to Articles 1, 43, and 44. However, at the August 1993 International Conference for the Protection of War Victims, the U.S. stated it was going to review its position on Protocol I. This review, at the DOD level, is ongoing.
- b. At the same time, President Reagan decided not to send Protocol I to the Senate, he did forward Protocol II with a recommendation that it be ratified, subject to some minor reservations and understandings. The U.S. views Protocol II, as it does many provisions of Protocol I, as reflective of customary international law. For political reasons, Protocol II was never ratified. Its fate is most likely tied to that of Protocol I.
- c. Nonetheless, the US considers virtually all the provisions of Protocol II and many provisions of Protocol I to reflect customary international law. The US supports the following articles of Protocol I: 5, 10, 11 12 - 34, 35 (1)(2), 37, 38, 44 (portions), 45, 51 (except para 6), 52, 54, 57 - 60, 62, 63, 70, 73 - 89. The US

specifically objects to articles 1(4), 35(3), 39(2), 43 & 44 (portions), 47, 55, and 56. Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l & Pol'y 419, 420 (1987). Mr. Matheson is the Deputy Legal Adviser at the Department of State.

III. 1980 CONVENTIONAL WEAPONS TREATY.

A. Introduction.

1. On 24 March 1995 President Clinton signed and deposited with the depositary the United States instrument of ratification for the 1980 United Nations Conventional Weapons Convention (UNCCW) and two of its three protocols. The three protocols are: Protocol on Non-Detectable Fragments (Protocol I); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III)
2. The focus of the treaty, which was an outgrowth of the 1974 -- 1977 Diplomatic Conference on Humanitarian Law is to limit those weapons capable of causing unnecessary suffering to either combatants or non-combatants. W. J. Fenrick, New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict, 1981 Can. Y.B. Int'l L. 229, 237-38.
3. The UNCCW did not codify what was customary law, instead the convention reflected "contractual undertakings adopted out of the common desire of the negotiators to control the conduct of future hostilities among those willing to accept them ...". J. Ashley Roach, Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?, 105 Mil. L. Rev. 3, 17
4. The treaty entered into force for the United States on 24 September 1995.

B. Treaty Provisions.

1. The treaty itself consists of eleven largely procedural articles. Of primary importance is the scope of application of the UNCCW. The UNCCW applies to international armed conflicts as discussed in common article 2 of

the Geneva Conventions, as well as to those conflicts described by the controversial article 1(4) of Additional Protocol I.

- a. The U.S. filed a reservation to a subsequent article (Article 7) of the UNCCW which effectively avoids application of the convention to the latter conflicts, thus ensuring that the U.S. position remains consistent.
- b. This reservation is as follows: "Article 7(4)(b) of the Convention shall not apply with respect the United States." 141 Cong. Rec. S4568 (daily ed. March 24, 1995). Article 7(4)(b) provides for application of the UNCCW between a national liberation movement and a state, in the case where the state is a High Contracting Party to the UNCCW, but is not a Party to Additional Protocol I. The High Contracting Party, e.g. the U.S. if engaged in a conflict with a national liberation movement, would be bound to apply the UNCCW if the authority representing that national liberation movement agreed to accept and apply the obligations of the 1949 Geneva Convention and the UNCCW, under the procedures set forth in article 96(3) of Protocol I to the Geneva Conventions. This reservation effectively ensures that the U.S. will not apply the UNCCW to such conflicts.

C. The Optional Protocols.

1. Optional Protocol I.

- a. Protocol I of the UNCCW consists of one article. It prohibits the use of any weapon whose primary effect is to injure a combatant by fragments which X-rays cannot detect.
- b. One of the few provisions of the Treaty applicable to combatants. Protocols II and III are designed to protect civilians.
- c. This protocol was motivated by concerns over the US use in Vietnam of cluster bomb units (CBUs), which contained plastic components. Upon closer examination, however, the convention negotiators realized that the vast majority of modern munitions contain fuzing mechanisms or lightweight plastic shell casings not designed as wounding agents. Memorandum from W. Hays Parks to Judge Advocate General (23 October 1980) (on file with author).
- d. For this reason Protocol I refers to weapons whose "primary effect"

is to injure through the use of non-detectable fragments; consequently, the CBU and other modern fragmenting weapons are not prohibited by the Protocol. Roach, supra note 3, at 69-70. Such weapons have the potential to increase the needless suffering of combatants because physicians may not be able to quickly detect the fragments.

- e. The absence of these type of weapons in the U.S. arsenal, or in any nation's arsenal, renders this protocol of limited utility now. See Fenrick, supra note 2, at 242; Roach, supra, note 3, at 69.
- f. The primary utility of this protocol is that it may provide some "... guidance to and provide some restraint upon the development of certain weapons." Roach, supra, at 72.

2. Optional Protocol II.

- a. Protocol II places prohibitions and restrictions on mines, booby traps, and other devices. Article 2 defines these terms as follows:
 - (1) "Mine" means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle, and "remotely delivered mine" means any mine so defined delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.
 - (2) "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.
 - (3) "Other devices" means manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time. (e.g. a time bomb).
 - (4) Note that Article 1 also expressly excludes naval mines from the coverage of Protocol II.
- b. **General Restrictions:** Article 3 contains general restrictions on these weapons including a prohibition on directing them against civilians (to include reprisals), and a prohibition on their

indiscriminate use.

- (1) Article 3 defines indiscriminate use as any placement of such weapons which is not directed at a military objective.
- (2) It also defines as indiscriminate that use which violates the rule of proportionality: use "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."
- (3) It should be noted that a military objective can include an area of land. Burris M. Carnahan, The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons, 105 Mil. L. Rev. 73, 79 (1984).
- (4) In planning the use of these weapons, military planners are required to take all feasible precautions to protect civilians from the effects. Article 3 defines feasible precautions as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."
- (5) These general restrictions also apply to the Convention's treatment of the more specific means of employing these weapons, discussed below.

c. **Specific Restrictions.** Protocol II also contains more detailed guidance for remotely delivered mines and non-remotely delivered weapons (whether they be mines, booby-traps, or other devices) employed in populated areas outside the combat zone.

- (1) Remotely delivered mines, e.g. scatterable mines, are prohibited unless they are used in areas which are military objectives. Even then, the mines must also be either capable of having their location accurately recorded or contain a self-actuating or remotely-controlled device which renders the weapon harmless when it no longer serves a military purpose.
- (2) The U.S. military employs scatterable mines, which are

remotely deployed by the hundreds from launchers on trucks or aircraft, and also from artillery shells. U.S. scatterable landmines self-destruct. Hidden Killers: The Global Landmine Crisis, supra at 53-54 (1994).

- (3) Non-remotely delivered weapons being used in a populated area outside combat zones (where combat is not taking place or is not imminent) are also prohibited unless employing forces either place the weapon near a military objective or take protective measures for the benefit of nearby civilians, e.g. provide them with a warning.

d. Article 6 contains prohibitions on various types of booby traps.

- (1) As a general rule, the treaty bans those booby traps designed in the form of apparently harmless objects and those which are designed to cause superfluous injury and unnecessary suffering.
- (2) The latter prohibition would prohibit the use of hidden pits containing punji sticks, poisoned with excrement. Carnahan, supra, note 9, at 90.
- (3) Specifically prohibited are booby traps attached to or associated with a list of ten items. Examples of such items include the following: internationally recognized protective symbols; the sick, wounded or dead; medical facilities; children's toys; religious objects, and animals.

e. The remaining three articles of Protocol II, and its technical annex, deal with precautionary requirements to mitigate the effects of these weapons.

- (1) Article 7 states recordation requirements governing minefields, as well as mines and booby traps, and, following the cessation of hostilities, disclosure requirements involving such records.
- (2) The Technical Annex to the UNCCW provides broad guidance regarding the content of these records.
- (3) When a United Nations force is involved in an operation (e.g., peacekeeping, observation, etc.), Article 8 calls for the parties to the conflict, if requested and as far as it is

possible, to take certain measures, regarding mines and booby traps, for the protection of those forces, e.g. remove mines/booby traps, provide locating data on mines/booby traps.

- (4) Finally, article 9 encourages parties to a conflict, following the cessation of hostilities, to cooperate in removing or rendering ineffective minefields, mines, and booby traps placed during a conflict.

f. Mines are currently a politically charged issue because of the large number of civilians being maimed/killed by indiscriminate mining in places like Angola, Iraq, Cambodia, and Afghanistan. (FY94 National Defense Authorization Act, Pub. L. No. 103-160, ' 1423).

- (1) Note, however, that the scope of application of the Convention does not reach internal conflicts, which describes the vast majority of conflicts in which mines are indiscriminately sewn. At the May 1996 Conventional Weapons Convention Review Conference the US and several other nations sought to extend this protocol to internal conflicts as well as take several other measures to mitigate the impact of antipersonnel landmines on civilians, e.g., increasing the metallic content of mines to make them more easily detectable, making landmines contain a self-destructing/passive self-deactivation (SD/SDA) mechanism, regulating the transfer of such mines and having a verification regime. The majority of these initiatives were incorporated into an amended Protocol II which is currently undergoing DoD review.
- (2) The ICRC and several other states, e.g., Austria, Belgium, Canada, Germany, Holland, Mexico, Norway, and Sweden, support a total prohibition on antipersonnel landmines.
- (3) Note, that the US has unilaterally imposed a moratorium on the export of antipersonnel landmines. FY 93 National Defense Authorization Act, Pub. L. No. 102-484 ' 1365 (extended until 23 October 1996 by FY 94 National Defense Authorization Act, supra at ' 1423. The US will also invoke a one year moratorium on the use of antipersonnel landmines beginning in 1999. FY 96 Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-107, ' 580. On 16

May 1996, the President established a policy that the U.S. will not use “dumb” antipersonnel mines (mines that do not self destruct or self neutralize) except in the Korean DMZ and for training.

- g. Ratification of the UNCCW will not impact U.S. landmine operations as current U.S. regulations comply with the UNCCW guidelines. Hidden Killers: The Global Landmine Crisis, *supra*, at 53.

3. Optional Protocol III.

- a. Prohibitions/restrictions on the use of Incendiary weapons.

- b. Art. 1: Protocol definitions.

- (1) Incendiary weapons are those whose primary effect is to set fire to objects or to cause burn injury to persons; a non-exclusive list of examples includes flame throwers and any shell, rocket, or grenades that contain incendiaries. Napalm clearly also qualifies as an incendiary.

- a) Does not include those weapons that have an incidental incendiary effect, e.g., tracers.

- b) Also does not include weapons with a combined effect, i.e., combines penetration/blast/fragmentation effects with an incendiary effect, e.g., armor-piercing tank munitions.

- (2) Concentration of civilians refers to any such concentration, whether permanent or temporary, e.g. towns, villages, refugee camps.

- c. Prohibits:

- 1) Targeting civilians for attack with incendiary weapons.

- 2) Targeting military objectives located within a concentration of civilians for attack with air-delivered incendiary weapons. The U.S. concerns about Protocol III center on this provision. This prohibition goes beyond customary Law of War requirements by negating the commander's ability to perform the normal proportionality analysis in this particular

scenario. W. Hays Parks, The Protocol on Incendiary Weapons, 279 Int'l Rev Red Cross 535, 548 (1990). The U.S. position is that air-delivered incendiaries may be the "weapon of choice" against certain targets, e.g. chemical munitions plants, and that their use may, in fact, result in fewer civilian casualties than would the use of conventional munitions. Id.

- 3) Targeting of forests/plant cover for attack with any incendiary except in case of military necessity, e.g. forests provide cover/concealment for enemy, necessary to create fields of fire.

4. Optional Protocol IV.

- a. A new Protocol dealing with blinding laser weapons. Drafted in October 1995 at the Conventional Weapons Convention Review Conference. While this conference was convened primarily to effect improvements on the landmine protocol, it failed to do so. Instead, it did reach agreement on this new protocol to the Convention.
- b. Prohibits the use or transfer of laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Purpose of protocol is to prohibit use of lasers for the purpose of causing mass blinding to enemy combatants. Recognizes that incidental or collateral blinding may occur as the result of the legitimate military use of lasers, e.g., target designation and range finding, and does not prohibit such use.
- c. While US is not yet a Party to this protocol, it does support its provisions. The protocol is consistent with Secretary of Defense William Perry's policy memorandum of 29 August 1995 regarding US use of laser weapons. The Departments of State and Defense are reviewing the protocol with a view to US ratification. Information Paper - Blinding Laser Protocol, Department of the Army, Judge Advocate General - International and Operational Law Division, 13 February 1996.

C. Current Status of Treaty.

1. International:
As of 7 May 1997, 66 nations are now Party to the Treaty. Recent Parties

include Italy, Belgium, Ireland, Israel, and the United Kingdom.

2. United States.

- a. U.S. originally signed the Treaty, but subsequently did not ratify it because of the objection discussed above involving air-delivered incendiaries.
- b. On 24 March 1995 the United States ratified Protocols I and II of the Conventional Weapons Convention.

3. The President transmitted the ratification package on amended Protocol II, Protocol III, and Protocol IV to the Senate on 7 January 1997.

Amended Protocol II (Mines Protocol) - “Essential step forward in dealing with the problem of anti-personnel landmines (APL).”

(1) Expands the scope of the original Protocol to include internal armed conflicts.

(2) Requires that all remotely delivered APL be equipped with self-destruct devices and backup self-deactivation features.

(3) Requires that all nonremotely delivered APL not equipped with such devices (“Dumb Mines”) be used within controlled, marked, and monitored minefields. (Falls short of Presidents APL policy statement of 16 May 1996 that prohibited U.S. military use of “Dumb” APL except in the Korean DMZ and in training.)

(4) Requires that all APL be detectable using available technology.

(5) Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use.

(6) Provides for means to enforce compliance. In his letter of Transmittal, the President emphasizes his continued commitment to the elimination of all APL.

Protocol III (Incendiary Weapons) - Ratification recommended on the condition of a proposed reservation - the U.S. reserves the right to use incendiaries against military objectives located in concentrations of civilians where such use could cause fewer casualties and less collateral damage than alternative weapons.

Protocol IV (Blinding Lasers) - Prohibits the use or transfer of laser weapons specifically designed to cause permanent blindness to unenhanced vision (the naked eye or the eye with corrective lenses).

Ratification recommended.

IV. 1993 CHEMICAL WEAPONS CONVENTION.

A. Introduction.

1. Earliest roots of this convention were in the 1899 and 1907 Hague Conventions.
 - a. A declaration in the 1899 Hague Convention condemned the use of projectiles designed to carry asphyxiating gases.
 - b. The Regulations annexed to the 1907 Hague IV Convention, specifically Art 23(a), prohibited the use of poison weapons.
2. The 1,300,000 gas casualties of WWI (100,000 fatalities) triggered the 1925 Geneva Gas Protocol.
 - a. Prohibits use in war of asphyxiating, poisonous or other gases as well as biological or bacteriological methods of warfare.
 - b. Recognized as a prohibition on the first use of chemical weapons, but did not prohibit the development, production, and stockpiling of either of these types of weapons.
 - c. Until the CWC, this convention was the primary legal restraint on the use of chemical weapons. Walter Krutzsch & Ralf Trapp, A Commentary on the Chemical Weapons Convention 1 (1994).
3. 1972 Biological and Toxin Weapons Convention filled the gap vis-a-vis biological weapons by prohibiting the development, production, and stockpiling of these weapons. The Parties to this convention, which include the US, agreed to continue negotiating toward a convention prohibiting chemical weapons. Such negotiations began in 1968. Id.
4. Beginning in 1978, a 44 nation negotiating forum, the Conference on Disarmament, worked on drafting a comprehensive ban on chemical weapons. The United States was one of the principal architects of the Chemical Weapons Convention that emerged from this lengthy process. Chemical Weapons Convention, Dep't St. Dispatch, Jan. 18, 1993 at 27.
5. Iraq's use of chemical weapons during the Iran/Iraq War, against their Kurdish population, and their threat of chemical attack during the Gulf War stimulated work on the treaty. Final Report to Congress: Conduct of the Persian Gulf War, supra at 639.

B. Key Provisions.

1. Preamble.

- a. Recognizes the international law prohibition on the use of herbicides as a "method of warfare." Note that, although the US did not consider the 1925 Gas Protocol to apply to herbicides or riot control agents (RCAs), Dep't of Army, Field Manual 27-10, The Law of Land Warfare, para 38 (change 1) (July 1956), the US now accepts prohibitions on the use of both herbicides and RCAs as a method of warfare. There are still non-warfare uses for both such as crop control and law enforcement. Chemical Weapons Convention, supra, at 30.
- b. Method of warfare refers to actions which further a belligerent's tactical or strategic objectives.

2. Article I: General Obligations.

- a. Each Party agrees to never, under any circumstances, develop, produce, stockpile, transfer to anyone, use, engage in military preparations to use, chemical weapons; or assist, encourage, or induce anyone to engage in any activity prohibited to a State Party under this convention.chemical weapons. This includes retaliatory use.
- b. Each Party agrees to destroy chemical weapons and chemical weapons production facilities it owns or are located under its jurisdiction and control, except for abandoned chemical weapons. The latter objects remain the obligation of the abandoning state Party to destroy.
- c. Each Party agrees not to use riot control agents (RCA) as a method of warfare.
 - 1) CWC expressly permits law enforcement use of RCAs, including domestic use.
 - 2) How does this obligation square with Executive Order (E.O.) 11850 dealing with the use of RCAs during war? Recall that the E.O., as a matter of policy (US considering that the 1925 Geneva Gas Protocol did not apply to herbicides and RCAs), stated that the US would not use RCAs first during war except for defensive purposes to save lives, citing four examples. Two of the four cited uses of RCAs in E.O. 11850, on SAR missions and in cases where civilians are used to mask attacks, are considered "methods

of warfare" by the Department of State, because of the presence of combatants. The executive branch has adopted this position. Thus, President Clinton has indicated that E.O. 11850 will be amended, if the US ratifies the convention. Until ratification occurs, however, EO 11850 still applies. Letter from President Clinton to the Senate of 6/23/94.

- 3) In that same letter President Clinton made it clear that the CWC does not apply to operations other than war (OOTW). Thus, these RCA restrictions are inapplicable to peacetime operations such as normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and NEO operations. Id.
- 4) Note that the US considers cayenne pepper spray to be a RCA. Memorandum from Chairman, Joint Chief of Staff to Vice Chief of Staff, US Air Force on 7/1/94.

2. Article II: Definitions. Some key definitions follow:

- a. Chemical weapons: Means the following, together or separately:
 - (1) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes.
 - (2) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices.
 - (3) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).
- b. Toxic chemical: any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. Lists of identified toxic

chemicals are contained on schedules in one of the convention's annexes.

- c. Riot Control Agent: Any chemical not listed in a schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.
- d. "Purposes Not Prohibited by the Convention means:"
 - 1) Industrial, agricultural, research, medical, pharmaceutical, or other peaceful purposes.
 - 2) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons. (A recognition of the value of chemical defense as a deterrent against chemical warfare. Allows state Parties to continue activities related to defence against chemical warfare in order to provide the required reassurance against regime breakouts, and, in particular, the possibility that certain relevant states may not become Parties. Krutzsch & Trapp, supra, at 41.)
 - 3) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare. (any chemical can be used for military purposes, including as a weapon as long as the predominant effect utilized in the weapon is not toxicity vis-a-vis man or animals. The key is not depending on the toxic properties of the chemical involved, e.g. explosive chemicals, rocket fuels, incendiaries, and smoke are not prohibited by the Convention because they do not rely on their toxic properties for their effectiveness. Id. at 42.)
 - 4) Law enforcement including domestic riot control. (Permits, at least, the wartime use of RCAs in PW camps or military prisons. Id.)

3. Article III: Declarations.

- a. Parties required to state if they own/possess chemical weapons, whether they are new, old, or abandoned, including their number and location.

- b. Parties also required to state status of any chemical weapons facilities.
- c. Declaration must contain a general plan for the destruction of all these materials/facilities.

4. Remaining Articles and Annexes.

- a. Articles IV and V contain detailed procedures for destruction of weapons and facilities and verification, including on-site inspections. These on-site inspections are considered routine inspections, as contrasted with the challenge inspections mentioned below.
- b. Article VI discusses legal uses of chemicals and corresponding verification regime.
 - 1) The amount of monitoring depends on the practical use of the chemical in question, e.g. if chemical has little or no use for legal purposes, it is subjected to rigorous verification measures.
 - 2) Many chemicals have dual uses - a condition which highlights the difficulties of verification.
- c. Article VIII establishes the international "Organization" (Organization for the Prohibition of Chemical Weapons - OPWC) that will monitor compliance and administer the CWC.
 - 1) OPWC will be analogous to the International Atomic Energy Agency (IAEA), established to administer the Nuclear Non-Proliferation Treaty.
 - 2) The Preparatory Commission is currently working in the Hague to create OPWC and to translate the CWC into detailed guidelines; it is scheduled to complete its work by early 1995.
 - 3) All signatory states are members of the Preparatory Commission.

- d. Article IX establishes the novel "challenge inspection" concept in which the Organization conducts a short notice inspection in response to another Parties' allegation of non-compliance.
 - 1) Convention attempts to balance the need for intrusiveness to address compliance concerns versus need to protect sensitive, non-CW-related facilities and information of national security concern. Chemical Weapons Convention, supra, at 31.
 - 2) Thus, a State Party to be inspected must accept a challenge inspection and make every reasonable effort to comply; however, the convention permits the challenged state to manage access to the site. Id.
- e. Article XII deals with sanctions in cases of non-compliance and vests OPWC with authority to refer matters to the United Nations.
- f. Convention also contains three annexes: Annex on Chemicals, Annex on Implementation and Verification, and the Annex on Confidential Information.

C. Current Status

- 1. Over 150 nations signed the Treaty in January 1993. Over 65 nations have already ratified it.
- 2. The U.S. ratified the treaty on 25 April 1997.

V. CONCLUSIONS.

International and Operational Law Department
The Judge Advocate General's School
Charlottesville, VA

CHAPTER 6
THE 1949 GENEVA CONVENTION ON
WOUNDED AND SICK IN THE FIELD
(GWS)

REFERENCES

1. I Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces of the Field, August 12, 1949, T.I.A.S. 3362. (GWS)
2. II Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, T.I.A.S. 3363. (GWS Sea)
3. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1. (GP I & II)
4. I Commentary on the Geneva Conventions, (Pictet ed. 1960).
5. Dept. of Army, Pamphlet 27-1, Treaties Governing Land Warfare, (7 Dec. 1956).
6. Dept. of Army, Pamphlet 27-1-1, Protocols to The Geneva Conventions of 12 August 1949 (1 Sept. 1979).
7. Dept. of Army, Pamphlet 27-161-2, International Law, Volume II (23 Oct. 1962).
8. Dept. of Army, Field Manual 27-10, The Law of Land Warfare (18 July 1956).
9. Dept. of Army, Field Manual 8-10, Health Service Support in a Theater of Operations, (1 March 1991).
10. Naval Warfare Publication 9/FMFM 1-10 (Revision A), The Commander's Handbook on the Law of Naval Operations (5 Oct. 1989).
11. Air Force Pamphlet 110-31, International Law - The Conduct of Armed Conflict and Air Operation (19 Nov. 1976).
12. Morris Greenspan, The Modern Law of Land Warfare (1959).
13. Dietrich Schindler & Jiri Toman, The Law of Armed Conflict (1988).
14. Hilaire McCoubrey, International Humanitarian Law, (1990).
15. Howard S. Levie, The Code of International Armed Conflict, (1986).
16. Alma Baccino-Astrada, Manual on the Rights and Duties of Medical Personnel in Armed Conflicts (1982).

INTRODUCTION.

Definition.

The term "Wounded and Sick" is not defined in the 1949 Convention. Concerned that any definition would be misinterpreted, the drafters decided that the meaning of the words was a matter of "common sense and good faith," Pictet, supra, at 136.

However, Article 8(a), Protocol I, contains the following widely accepted definition: "Persons who because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.

GWS (Sea) applies same protections to those "shipwrecked" at sea - shipwrecked meaning "shipwreck from any cause and includes forced landings at sea by or from aircraft," (Art. 12). The inclusion of airmen in the definition of shipwrecked was the result of the significant number of aircrews downed in the English Channel during the Battle of Britain. Geoffrey Best, War and Law Since 1945 134 (1994). Protocol I provides a more detailed definition of "shipwrecked" which includes the same elements as the wounded and sick definition in article 8(a) above, article 8(b), Protocol I.

Scope of Application. For the protected persons who have fallen into the hands of the enemy, the GWS applies until their final repatriation. (GWS, art. 5)

CATEGORIES OF WOUNDED AND SICK.

Protected Persons (Article 13) - same as Article 4, GPW.

Members of armed forces of a Party to the conflict, . . . militias [and] volunteer corps forming part of such armed forces.

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . . provided [they] fulfill the following conditions:

that of being commanded by a person responsible for his subordinates;

that of having a fixed distinctive sign recognizable at a distance;

that of carrying arms openly;

that of conducting their operations in accordance with the laws and customs of war.

Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

Persons who accompany the armed forces without actually being members thereof . . . provided they have received authorization from the armed forces which they accompany. . . .

Members of crews . . . of the merchant marine and . . . civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.

Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces . . . provided they carry arms openly and respect the laws and customs of war.

Civilians.

Not expressly covered by GWS - but have general protection as noncombatants - may not be targeted.

Express coverage is found, however, in the Geneva Civilians Conventions (GC), Article 16: "The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect." See G.I.A.D. Draper, The Red Cross Conventions of 1949 74 (1958).

Then Protocol I (GP I), in 1977, expressly included civilians within its definition of "wounded and sick," Article 8(a).

Thus, as a practical matter, all wounded and sick, military and civilian, in the hands of the enemy must be respected and protected. FM 27-10, supra, at para. 208; FM 8-10, supra, para. 3-17.

THE HANDLING OF THE WOUNDED AND SICK.

Protection (Article 12).

General - "Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances."

Respect - to spare, not to attack.

During the Vietnam conflict there were several examples of violations of this prohibition, e.g. during the November 1965 battle in Ia Drang Valley pitting regular North Vietnamese (NVA) units against units of the 1st Cavalry Division there were several accounts of NVA personnel shooting wounded Americans lying on the battlefield. Moore, We were Soldiers Once and Young (1993).

During the Falklands War, international humanitarian law was generally well followed but there was an incident where 2 lightly armed British helos accompanying a supply ship were shot down and Argentinean forces continued to fire on the helo crewmen as they struggled in the water. Three of the crewmen were killed, and the fourth was wounded. Soon after this incident an Argentinean flyer was shot down. British leadership ensured proper treatment despite some reprisal suggestions. Robert Higginbotham, Case Studies in the Law of Land Warfare II: the Campaign in the Falklands, Military Review 52-53 (Oct 1984).

Protect - to come to someone's defense; to lend help and support.

A excellent example of this concept occurred in the Falklands when a British soldier came upon a gravely wounded Argentinean whose brains were leaking into to his helmet. The Brit scooped the extruded material back into the soldier's skull and evacuated him. The Argentinean survived. Higginbotham, supra, at 50.

Extent of Obligation - It is "unlawful for an enemy to attack, kill, ill treat or in any way harm a fallen and unarmed soldier, while at the same time . . . the enemy [has] an obligation to come to his aid and give him such care as his condition require[s]". Pictet, supra, at 135.

Care (Article 12).

Standard is one of humane treatment - "[E]ach belligerent must treat his fallen adversaries as he would the wounded of his own army," . Pictet, supra, at 137.

No adverse distinctions may be established in providing care.

May not discriminate against wounded or sick because of "sex, race, nationality, religion, political opinions, or any other similar criteria."

Note the use of the term "adverse" permits favorable distinctions, e.g. taking physical attributes into account, such as in the case of children, pregnant women, the aged, etc.,.

The wounded and sick "shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created."

The first prohibition stems from a recognition that wounded personnel, who had not yet received medical treatment, "were profitable subjects for interrogation." Draper, supra, at 76. Professor Draper cites the German practice during World War II at their main aircrew interrogation center. They frequently delayed medical treatment until after interrogation. Such conduct is now expressly forbidden.

The second prohibition was designed to counter the German practice of sealing off Russian PW camps once typhus or tuberculosis was discovered. Best, supra, at 134.

Order of Treatment (Article 12).

Determined solely by reasons of medical urgency. Designed to strengthen the principle of equal treatment articulated above.

Treatment is accorded using triage principles which provide the greatest medical assets to those with significant injuries who may benefit from treatment, while those wounded who will die no matter what and those whose injuries are not serious are given lesser priority.

The US applies this policy at the evacuation stage, as well as at the treatment stage. "Sick, injured, or wounded EPWs are treated and evacuated through normal medical channels, but are physically segregated from US or allied patients. The EPW patient is evacuated from the combat zone as soon as his medical condition permits." Dep't of Army Field Manual 8-10-6, Medical Evacuation in a Theater of Operations, appendix A-1 (31 October 1991).

During Operation Just Cause, wounded Panamanian Defense Force personnel were evacuated on the same aircraft as US personnel and provided the same medical care as US forces. Lessons Learned: Operation Just Cause, Unclassified Executive Summary, p. 7 (24 May 1990) (on file at TJAGSA).

In the Falklands the quality of medical care provided by the British to the wounded, without distinction between British and Argentinean, was remarkable. More than 300 major surgeries were performed, and 100 of these were on Argentinean soldiers. Higginbotham, supra, at 50.

Unfortunately, as pointed out by Professor Levie citing the example of the Japanese during World War II, "this humanitarian procedure [referring to treating enemy wounded like your own] is far from being universally followed." Howard S. Levie, Prisoners of War in International Armed Conflict, 100 (1976).

Medical personnel must make the decisions regarding medical priority on the basis of their medical ethics. Baccino-Astrada, supra, at 40. This standard is reiterated in Article 10, Protocol I for emphasis.

If Compelled to Abandon Wounded and Sick to the Enemy (Article 12).

While a party can expect that the enemy will care for his wounded personnel, if, during a retreat, a commander is forced to leave behind wounded and sick, he is required to leave behind medical personnel and material to assist in their care.

"[A]s far as military considerations permit." - there is, however, a military necessity exception to this requirement. Thus a commander need not leave behind medical personnel if such action will leave his unit without adequate medical staff. Nor can the enemy refuse to provide medical care to abandoned enemy wounded on the grounds that the enemy failed to leave behind medical personnel. The detaining power ultimately has the absolute respect and protect obligation. Pictet, supra, at 142.

Status of Wounded and Sick (Article 14).

The wounded or sick soldier enjoys the status of a PW. Actually the soldier will be protected under both the wounded and sick convention and the PW convention until recovery is complete, at which time the soldier is exclusively governed by the PW convention.

While the conventions overlap, i.e. during the treatment and recovery phase, the wounded and sick convention takes precedence. But, as Pictet states, this is an academic point as the protections in both are largely the same. Pictet, supra, at 147.

Search for Casualties (Article 15).

Search, Protection, and Care.

"At all times, and particularly after an engagement." Parties have an ongoing obligation to search for the wounded and sick as conditions permit. The commander determines when it is possible to do so. This mandate applies to all casualties, not just friendly casualties.

The drafters recognized that there were times when military operations would make the obligation to search for the fallen impracticable. Pictet, supra, at 151.

By way of example, US policy during Operation Desert Storm was not to search for casualties in Iraqi tanks or armored personnel carriers because of concern about unexploded ordnance.

Similar obligations apply to maritime operations (article 18, GWS Sea). It was through this military necessity exception that HMS Conqueror was under no obligation to assist the shipwrecked members of the Argentinean cruiser General Belgrano after its torpedo attack against it. Because Conqueror was reasonably concerned about the threat of a destroyer attack if it lingered in the area, it did not. Admiral Sandy Woodward, One Hundred Days 162 (1992). Professor Draper explicitly states that "[I]t is apparent that submarines will rarely be in a position to search for and collect the wounded or shipwrecked. Neither has such a craft the facilities for ensuring their adequate care. Further, the search for shipwrecked by even larger ships is operationally a very dangerous proceeding, exposing the search vessel to the grave risk of submarine attack by day or night and to air attack by day." Draper, supra, at 87.

The protection requirement refers to preventing pillage of the wounded by the "hyenas of the battlefield."

Care refers to the requirement to render first aid.

Note that the search obligation also extends to searching for the dead, again, as military conditions permit. During the Falklands the Argentineans were scrupulous in handling of the dead. A Harrier pilot was killed over Goose Green and buried with military honors. Higginbotham, supra, at 51.

Suspensions of Fire and Local Agreements.

Suspensions of fire are agreements calling for cease-fires that are sanctioned by the Convention to permit the combatants to remove, transport, or exchange the wounded, sick and the dead (note that exchanges of wounded and sick between parties did occur to a limited extent during World War II, Pictet, supra, at 155).

Suspensions of fire were not always possible without negotiation and, sometimes, the involvement of staffs up the chain of command. Consequently, local agreements, an innovation in the 1949 convention to broaden the practice of suspensions of fire by authorizing similar agreements at lower command levels, are sanctioned for use by local on-scene commanders to accomplish the same function.

Article 15 also sanctions local agreements to remove or exchange wounded and sick from a besieged or encircled area, as well as the passage of medical and religious personnel and equipment into such areas. The Geneva Civilians convention contains similar provisions for civilian wounded and sick in such areas. It is this type of agreement that has been used to permit the passage medical supplies to the city of Sarajevo, under siege since the spring of 1992.

Identification of Casualties (Articles 16-17).

Parties are required, as soon as possible to record the following information regarding the wounded, sick, and the dead: name, ID number, DOB, date and place of capture or death, and particulars concerning wounds, illness, or cause of death.

Forward information to Information Bureau (See Article 122, GPW). Information Bureaus are established by Parties to the conflict to transmit and to receive information/articles regarding PWs to/from the ICRC's Central Tracing Agency. The US employs the National PW Information Center (NPWIC) in this role.

In addition, Parties are required to forward the following information and materials regarding the dead:

Death certificates.

ID disc.

Important documents, e.g. wills, money, etc. found on the body.

Personal property found on the body.

Handling of the Dead.

Examination of bodies and also a medical examination, if possible, to confirm death and to identify the body. Such examinations can play a dispositive role in refuting allegations of war crimes committed against individuals. Thus, they should be conducted with as much care as possible.

No cremation (except for religious or hygienic reasons).

Honorable burial. Individual burial is strongly preferred; however, there is a military necessity exception which permits burial in common graves, e.g. if circumstances, such as climate or military concerns, necessitate it. Pictet, *supra*, at 177.

Mark and record grave locations.

Voluntary Participation of Local Population in Relief Efforts (Article 18).

Commanders may appeal to the charity of local inhabitants to collect and care for the wounded and sick. Such actions by the civilians must be voluntary. Similarly, commanders are not obliged to appeal to the civilians.

Spontaneous efforts on the part of civilians to collect and care for the wounded and sick is also permitted. This provision arose from the fact that the Germans prohibited German civilians from aiding wounded airmen.

Ban on the punishment of civilians for participation in relief efforts.

Continuing obligations of occupying power. Thus, the occupant can't use the employment of civilians as a pretext for avoiding their own responsibilities for the wounded and sick. The contribution of civilians is only incidental. Pictet, supra, at 193.

Civilians must also respect the wounded and sick. This is the same principle discussed above (article 12) vis-a-vis armed forces. This is the only article of the convention that applies directly to civilians. Pictet, supra, at 191.

STATUS AND PROTECTION OF PERSONNEL AIDING WOUNDED AND SICK.

Categories of Persons Protected Based Upon Rights Possessed.

The first category: Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments as well as chaplains (Article 24), and personnel of national Red Cross/Crescent Societies and other recognized relief organizations (Article 26).

Respect and protect (Article 24) - applies "in all circumstances."

In Vietnam US soldiers claimed that the NVA and Vietcong targeted medical personnel because of their importance in maintaining morale. So they'd shoot medics even if they were giving care. Consequently medics often avoided wearing armbands which acted as bullseyes. There were even reports that the Vietcong paid an incentive for killing medics. Eric M. Bergerud, Red Thunder, Tropic Lightning: The World of a Combat Division in Vietnam 201-03 (1993).

Status upon capture (Article 28) - **Retained Personnel**, not PWs.

A new provision in the 1949 convention. The 1864 and 1906 conventions required immediate repatriation. The 1929 convention also required repatriation, absent an agreement to retain medical personnel. During World War II, the use of these agreements became extensive, and very few medical personnel were repatriated. Great Britain and Italy, for example, retained 2 doctors, 2 dentists, 2 chaplains, and 12 medical orderlies for every 1,000 PWs.

The 1949 convention institutionalized this process. Some government experts proposed making medical personnel straight PWs, the idea being that wounded PWs prefer to be cared for by their countrymen, speaking the same language. The other camp, favoring repatriation, cited the traditional principle of inviolability - that medical were non-combatants. What resulted was a compromise: medical personnel were to be repatriated, but if needed to treat PWs, were to be retained and treated, at a minimum, as well as PWs. Pictet, supra, at 238-40.

Note that medical personnel may only be retained to treat PWs. Under no circumstances could they be retained to treat enemy personnel. While the preference is for the retained persons to treat PWs of their own nationality, the language is sufficiently broad to permit retention to treat **any** PW. Pictet, supra, at 241.

Repatriation (Articles 30-31).

Repatriation is the rule; retention the exception. Retained only so long as required by state of health and spiritual needs of PWs and then return when retention is not indispensable. Pictet, supra, at 260-61.

Article 31 states that selection of personnel for return should be irrespective of race, religion or political opinion, preferably according to chronological order of capture - First-in/First-out approach.

Parties may enter special agreements regarding the percentage of personnel to be retained in proportion to the number of prisoners and the distribution of the said personnel in the camps. The US practice is that retained persons will be assigned to PW camps in the ratio of 2 doctors, 1 dentist, 1 chaplain, 6 medics, per 1,000 PWs. Those not required will be repatriated. See, Dep't of Army Reg. 190-8, Enemy Prisoners of War Administration, Employment, and Compensation para. 2-25 (1 July 1982).

Since World War II, this is one of the least honored provisions of the convention. US medical personnel in Korea and Vietnam were not only not repatriated, but were also denied retained person status. Memorandum of W. Hays Parks to Director, Health Care Operations reprinted in The Army Lawyer, April 1989, at 5.

Treatment (Article 28).

May only be required to perform medical and religious duties.

Receive at least all benefits conferred on PWs, e.g. pay, monthly allowances, correspondence privileges. AR 190-8, supra.

Are subject to camp discipline.

Relief (Article 28). Belligerents may relieve doctors retained in enemy camps with personnel from the home country. During World War II some Yugoslavian and French doctors in German camps were relieved. Pictet, *supra*, at 257.

Continuing obligation of detaining power (Article 28). The detaining power is bound to provide free of charge whatever medical attention the PWs require.

Auxiliary medical support personnel of the Armed Forces (Articles 25 & 29).

These are personnel who have received special training in other medical specialties, e.g. orderlies, nurses, stretcher bearers, in addition to performing other military duties.

Respect and protect (Article 25) -when acting in medical capacity.

Status upon capture (Article 29) -PWs; however, must be employed in medical capacity insofar as a need arises.

Treatment (Article 29).

When not performing medical duties, treat as PWs.

When performing medical duties, they remain PWs, but receive treatment under Article 32, GPW, as retained personnel; however, they are not entitled to repatriation.

Auxiliaries are not widely used, but see W. Hays Parks memorandum, supra, (in materials) for discussion of certain US personnel, who de facto, become auxiliary personnel. See also FM 8-10, supra, at para. 3-18b (discusses this same issue and points out that article 24 personnel switching between medical and non-medical duties **at best** places such individuals in the auxiliary category.

The US Army does not employ any auxiliary personnel. FM 8-10, supra, at para. 3-18. Air Force regulations do provide for these personnel. See Bruce T. Smith, Air Force Medical Personnel and the Law of Armed Conflict, 37 A. F. L. Rev. 242 (1994).

Personnel of aid societies of neutral countries (Articles 27 & 32).

Nature of assistance: procedural requirements (Article 27).

Consent of neutral government.

Consent of party being aided.

Notification to adverse party.

Retention prohibited (Article 32) -must be returned "as soon as a route for their return is open and military considerations permit."

Treatment pending return (Article 32) - must be allowed to perform medical work.

MEDICAL UNITS AND ESTABLISHMENTS.

Protection.

Fixed Establishments and Mobile Medical Units (Article 19).

May not be attacked.

In Afghanistan, the Soviets engaged in a campaign to destroy hospitals and dispensaries operated by non-governmental organizations (Medecins sans Frontieres, Medecins du Monde, Aide Medicale Internationale - all French doctors and nurses - NGOs). In September of 1980, the Soviets sacked the hospital at Yakaolang, even destroying all medical supplies and equipment. In late 1981 the Soviets systematically bombed hospitals operated by French medical organizations. At least 8 hospitals of the three NGOS above hit. One was rebuilt with a prominent red cross, but was still bombed again by Russian helos. Helsinki Watch, Tears, Blood, and Cries, Human Rights in Afghanistan since the Invasion 1979-1984, at 184-6.

In Vietnam during the 1968 Tet offensive, communist forces attacked the 45TH MASH at Tay Ninh, killing one doctor and two medics. Bergerud, supra, at 206.

Commanders are encouraged to situate medical units and establishments away from military objectives. See also Article 12, GP I, which states that medical units will, in no circumstances, be used to shield military objectives from attack.

If these units fall into the hands of an adverse party, medical personnel will be allowed to continue caring for wounded and sick.

Discontinuance of Protection (Article 21).

These units/establishments lose protection if committing "acts harmful to the enemy." Pictet cites as examples such acts as using a hospital as a shelter for combatants, as an ammunition dump, or as an observation post. Pictet, *supra*, at 200-01.

Protection ceases only after a warning has been given and it remains unheeded after a reasonable time to comply. A reasonable time varies on the circumstances, e.g. no time limit would be required if fire is being taken from the hospital. Pictet, *supra*, at 202.

No warning, however, would be necessary if a unit was taking fire from hospital. FM 8-10, supra, at para. 3-20.

Article 13, GP I, extends this same standard to civilian hospitals.

Conditions not depriving medical units and establishments of protection (Article 22).

Unit personnel armed for own defense against marauders and those violating the law of war, e.g. by attacking a medical unit. Medical personnel thus may carry small arms, such as rifles or pistols for this purpose. In contrast, placing machine guns, mines, LAAWS, etc., around a medical unit would cause a loss of protection. FM 8-10, *supra*, at para. 3-21.

Unit guarded by sentries. Normally medical units are guarded by its own personnel. It will not lose its protection, however, if a military guard attached to a medical unit guards it. These personnel may be regular members of the armed force, but they may only use force in the same circumstances as discussed in para 3(a) above. FM 8-10, *supra*, at para. 3-21.

Small arms taken from wounded are present in the unit.

Presence of personnel from the veterinary service.

Provision of care to civilian wounded and sick.

Disposition of Captured Buildings and Material of Medical Units and Establishments.

Mobile Medical Units (Article 33).

Material of mobile medical units, if captured, need not be returned. This was a significant departure from the 1929 convention which required mobile units to be returned.

But material must be used to care for the wounded and sick. First priority for the use of such material are the wounded and sick in the captured unit. If there are no patients in the captured unit, the material may be used for other patients. Pictet, *supra*, at 274; See also FM 8-10, *supra*, at para. 3-19.

Fixed Medical Establishments (Article 33).

While the captor has no obligation to restore this property to the enemy - he can maintain possession of the building, and its material becomes his property. However, the building and the material must be used to care for wounded and sick as long as requirement exists. Morris Greenspan, *The Modern Law of Land Warfare* 85 (1959).

Exception - "in case of urgent military necessity," they may be used for other purposes.

If a fixed medical establishment is converted to other uses, prior arrangements must be made to ensure that wounded and sick are cared for.

Medical material and stores of both mobile and fixed establishments "shall not be intentionally destroyed." **No military necessity exception.**

MEDICAL TRANSPORTATION.

Medical Vehicles - Ambulances (Article 35).

Respect and protect - may not be attacked if performing medical function. During the Bosnian conflict, there were several reports of attacks on medical vehicles, e.g., on June 24, 1992, Bosnian Serb machine gunners fired on two ambulances killing all six occupants. Helsinki Watch, War Crimes in Bosnia-Herzegovina 115 (1992).

These vehicles may be employed permanently or temporarily on such duties and they need not be specially equipped for medical purposes. Pictet, supra, at 281. Professor Draper states that "[A]s ambulances are not always available, any vehicles may be adapted and used temporarily for transport of the wounded. During that time they will be entitled to protection, subject to the display of the distinctive emblem. Thus military vehicles going up to the forward areas with ammunition may bring back the wounded, with the important reservation the emblem must be detachable, e.g, a flag, so that it may be flown on the downward journey. Conversely military vehicles may take down wounded and bring up military supplies on the return journey. The flag must then be removed on the return journey." Draper, supra, at 83.

Key issue for these vehicles is the display of the distinctive emblem, which accords them protection.

Camouflage scenario: Belligerents are only under an obligation to respect and protect medical vehicles so long as they can identify them. Consequently, absent the possession of some other intelligence regarding the identity of a camouflaged medical vehicle, belligerents would not be under any obligation to respect and protect it. FM 8-10, supra, at para. 3-19. See Draper, supra, at 80.

Display the emblem only when the vehicle is being employed on medical work, misuse of the distinctive symbol is a war crime. FM 27-10, supra, at para. 504.

Upon capture, these vehicles are "subject to the laws of war."

Thus, the captor may use them for any purpose.

If the vehicles are used for non-medical purposes, the captor must ensure care of wounded and sick they contained, and, of course, ensure that the distinctive markings have been removed.

Medical Aircraft (Article 36).

Definition - Aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment.

Protection.

Marked with protected emblem.

However, protection ultimately depends on an agreement: medical aircraft are not be attacked if "flying at heights, times and on routes specifically agreed upon between the belligerents." The differing treatment accorded to aircraft, as opposed to ambulances is a function of their increased mobility and consequent heightened fears about their misuse. Also "the speed of modern aircraft makes identification by colour or markings useless. Only previous agreement could afford any real safeguard." Draper, supra, at 84.

Without such an agreement, belligerents use medical aircraft at their own risk. Pictet, supra, at 288; FM 8-10, supra, at para. 3-19.

This was certainly the case in Vietnam where "any air ambulance pilot who served a full one year tour could expect to have his aircraft hit at least once by enemy fire." "Most of the Viet Cong and North Vietnamese clearly considered the air ambulances just another target." Dorland & Nanney, Dust Off: Army Aeromedical Evacuation in Vietnam 85-86 (1982)(although the authors note the pilot error and mechanical failure accounted for more aircraft losses than did hostile fire).

Medical aircraft (and vehicles) took fire from Panamanian paramilitary forces (DIGBATS) during Operation Just Cause. Center for Army Lessons Learned, Operation Just Cause: Lessons Learned, p. III-14, (October 1990).

By contrast, in the Falklands each of the hospital ships (British had 4; Argentineans had 2) had one dedicated medical aircraft with red cross emblems. Radar ID used to identify these aircraft because of visibility problems. Latter done by the tacit agreement of the parties. Both sides also used combat helos extensively, flying at their own risk. No casualties occurred. Junod, Protection of the Victims of the Armed Conflict in the Falklands, ICRC, p. 26-27.

Aircraft may be used permanently or temporarily on a medical relief mission; however, to be protected it must be used "exclusively" for a medical mission during its relief mission. Pictet, supra, at 289. This raises questions as to whether the exclusivity of use refers to the aircraft's entire round trip or to simply a particular leg of the aircraft's route. The point is overshadowed, however, by the ultimate need for an agreement, in order to ensure protection. Pictet also says exclusively engaged means without any armament. See also article 28(3) in Protocol I; FM 8-10-6, supra, at A-3 (the mounting or use of offensive weapons on dedicated medevac vehicles and aircraft jeopardizes the protection afforded by the conventions. Offensive weapons include, but are not limited to, machine guns, grenade launchers, hand grenades, and light anti-tank weapons).

Reporting information acquired incidentally to the aircraft's humanitarian mission does not cause the aircraft to lose its protection. Medical personnel are responsible for reporting information gained through casual observation of activities in plain view in the discharge of their duties. This does not violate the law of war or constitute grounds for loss of protected status. Dep't of Army Field Manual 8-10-8, Medical Intelligence in a Theater of Operations para. 4-8 (7 July 1989). For example, a medevac aircraft could report the presence of an enemy patrol if the patrol was observed in the course of their regular mission and was not part of an information gathering mission outside their humanitarian duties.

Flights over enemy or enemy-occupied territory are prohibited unless agreed otherwise.

Summons to land.

Means by which belligerents can ensure that the enemy is not abusing its use of medical aircraft - **must be obeyed**.

Aircraft must submit to inspection by the forces of the summoning Party.

If not committing acts contrary to its protected status, must be allowed to continue.

Involuntary landing.

Occurs as the result of engine trouble or bad weather. Aircraft may be used by captor for any purpose.

Personnel are retained or PWs.

Wounded and sick must still be cared for.

Inadequacy of GWS Article 36 in light of growth of use of medical aircraft prompted overhaul of the regime in GP I (Articles 24 - 31).

Establishes three overflight regimes:

Land controlled by friendly forces (Article 25): No agreement required; however, article recommends that notice be given, particularly if there is a SAM threat.

Contact Zone (disputed area) (Article 26): Agreement required for absolute protection. However, **enemy is not to attack once aircraft identified as medical aircraft.**

Land controlled by enemy (Article 27): Overflight agreement required. Similar to GWS, Article 36(3) requirement.

Optional distinctive signals (Annex I, Chapter 3, Protocol I), e.g. radio signals, flashing blue lights, electronic identification, are all being employed in an effort to improve identification.

DISTINCTIVE EMBLEMS.

Emblem of the Conventions and Authorized Exceptions (Article 38).

Red Cross. The distinctive emblem of the conventions.

Red Crescent. Authorized exception.

Red Lion and Sun. Authorized exception employed by Iran, although has since been replaced by the red crescent.

Unrecognized symbols. The most well-known is the red "Shield of David" of Israel.⁵⁰ While the 1949 diplomatic conference considered adding this symbol as an exception, it was ultimately rejected. Several other nations had requested the recognition of new emblems and the conference became concerned about the danger of substituting national or religious symbols for the emblem of charity, which must be neutral. There was also concern that the proliferation of symbols would undermine the universality of the red cross and diminish its protective value. Pictet, supra, at 301. In the various Middle East conflicts involving Israel and Egypt, however, the "shield of David" has been respected. FM 8-10, supra, at para. 3-19.

Identification of Medical and Religious Personnel (Article 40).

Note the importance of these identification mechanisms. The two separate and distinct protections given to medical and religious personnel are, as a practical matter, accorded by the armband and the identification card. FM 8-10, supra, at para. 3-18.

The armband provides protection from intentional attack on the battlefield.

The identification card indicates entitlement to "retained person" status.

Permanent medical personnel, chaplains, personnel of National Red Cross and other recognized relief organizations, and relief societies of neutral countries (Article 40).

Armband displaying the distinctive emblem.

Identity card - U.S. uses DD Form 1934 for the ID cards of these personnel.

Confiscation of ID card by the captor prohibited. Confiscation renders determination of retained person extremely difficult.

⁵⁰ Israel entered a reservation to the GWS regarding its use of Red Shield of David, stating that Israel would continue to use that as its distinctive emblem. Draper, supra, at 84-5.

Auxiliary personnel (Article 41).

Armband displaying the distinctive emblem in miniature.

ID documents indicating special training and temporary character of medical duties.

Marking of Medical Units and Establishments (Article 42).

Red Cross flag and national flag.

If captured, fly only Red Cross flag.

Marking of Medical Units of Neutral Countries (Article 43).

Red Cross flag, national flag, and flag of belligerent being assisted.

If captured, fly only Red Cross flag and national flag.

Authority over the Emblem (Article 39).

Article 39 makes it clear that the use of the emblem by medical personnel, transportation, and units is subject to "competent military authority." The commander may give or withhold permission to use the emblem, and the commander may order a medical unit or vehicle camouflaged. Pictet, supra, at 308.

While the convention does not define who is a competent military authority, it is generally recognized that this authority is held no lower than the brigade commander (generally O-6) level. FM 8-10, supra, at para. 3-19.

CONCLUSION.

NAVREGS 1063: While assigned to a combat area during a period of armed conflict, medical, dental, chaplain, medical service, nurse, Hospital Corps, and Dental Technicians shall be detailed or permitted to perform only such duties as are related to medical, dental, or religious service and the administration of medical, dental, or religious units and establishments. This restriction is necessary to protect their noncombatant status. Air Force (AFP 160-4) and Army regulations (FM 8-10) reflect a similar policy.

- CAT 1: PEOPLE TO WHOSE WOUNDS ARE NOT LIFE-THREATENING AND CAN WAIT A COUPLE OF DAYS; THOSE MORE SEVERELY WOUNDED (LIFE THREATENING) WHO COULD BE WORKED ON FOR SHORT PERIODS; AND FINALLY, THE EXPECTANTS, THOSE WHO WOULD DIE NO MATTER WHAT TREATMENT THEY WERE GIVEN. RTTL, AT P. 206-7.

- ICRC made allegations during ODS that we put Iraqis in mass graves without removing their dogtags. US responded that it had no evidence that US did this. ICRC link to US was the use of US body bags. US said it provided US body bags to many units, e.g. the Saudis and even the Iraqis during the Iran-Iraq War. Confidential memo in safe.

(2- Afghanistan: Soviet treatment of medical personnel, both

Afghan and civilian) was not good. Afghan docs treating resistance fighters were considered enemy personnel by Soviet-Afghan forces. They actively sought French docs and executed some old Afghans who refused to disclose their whereabouts.

*** Status of Certain Medical Corps and Medical Service Corps Officers under the GWS** (see attached DAJA-IA memorandum and FM 8-10, para 3-18b).

- MSC officers who are assigned as commanders of non-medical of FSBs or MSBs with responsibility for base cluster defense or MSC officers/AMEDD NCOs serving as staff officers with the FSB. Not entitled to GWS protections. Should not possess medical ID card (DD Form 1934).
- AMEDD officers, assigned to medical duties, who temporarily fulfill non-medical duties, e.g. medical company commander detailed as convoy march unit commander, with responsibility for convoy defense.
- MSC and other Army officer helicopter pilots, not permanently assigned to AMEDD units, flying combat missions in addition to medevac flights.
- Latter two categories: Entitled to auxiliary medical personnel protections while employed in their medical roles. But should not possess medical ID card. These personnel, if reassigned to duties in which they would be "exclusively engaged," could then be issued a medical ID card. Don't flip-flop ID cards from day-to-day.
- 12TH EVAC HOSPITAL AT CU CHI, PLACED BETWEEN 125 SIGNAL BATTALION AND 8" GUN BATTERIES. SOME QUESTIONED WISDOM OF SETTING UP A HOSPITAL BETWEEN TWO PRIME TARGETS. RTTL, P. 206.
- McCoubrey says vets do not fall under the humanitarian aegis because in the context of

military action its role is seen as "military", the modern analogy being more with mechanics attached to tank corps. Their use he says is vis a vis pack animals. They are not to be attached to a medical unit, although they may be present at one.

- SOME MEDICS PRACTICED "PREVENTIVE MEDICINE," IE. ARMING THEMSELVES AND TAKING PART IN COMBAT. RTTL, P. 55.

- Falklands: Argie engineers volunteered to move some ammo near their PW camp. An explosion and fire occurred. A Brit medic ran into the fire and pulled at least two out. One could not be reached because of the intensity of the fire. The man was on fire, both legs blown off and his abdomen torn open. The medic used his pistol to shoot him. Fellow Argies thanked the medic for his actions saying it was humane under the circumstances. Violates the letter but not the spirit of GWS. Higginbotham, p. 58.